

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 01 July 2003

CASE NO.: 2003 STA 14
In the Matter of

RONALD L. REGAN, JR.
Complainant

v.

NATIONAL WELDERS SUPPLY
Respondent

Appearances: Mr. Scott Gregory Crowley, Attorney
For the Complainant

Mr. C. Randolph Sullivan, Attorney
Mr. Michael L. Walton, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER -
DISMISSAL OF COMPLAINT**

This action arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act ("STAA" or "Act") of 1982, as amended and re-codified, Title 49 United States Code Section 31105, and the corresponding agency regulations, Title 29, Code of Federal Regulations ("C.F.R.") Part 1978. Section 405 of the STAA provides for employee protection from employer discrimination because the employee has engaged in a protected activity, consisting of either reporting violations of commercial motor vehicle safety rules or refusing to operate a vehicle when the operation would violate these rules.

On December 20, 2002, after an investigation by the Occupational Safety and Health Administration ("OSHA"), United States Department of Labor ("DOL"), of Mr. Ronald Regan's allegation of illegal discrimination by National Welders Supply under the Act, the Regional Administrator determined the complaint did not have merit. After receiving the Regional Administrator's determination, Mr. Regan, through counsel, filed his exceptions to the determination and requested on January 7, 2003 a hearing with the Office of Administrative Law Judges. Pursuant to a Notice of Hearing, dated January 22, 2003, I set a hearing date of February 12, 2003 for this case

in Richmond, Virginia (ALJ 1).¹ After a subsequent continuance (ALJ 2), I conducted a hearing on March 12, 2003. Mr. Regan, his attorney, Mr. Crowley, and counsel for the Respondent, Mr. Sullivan and Mr. Walton, were present at the hearing. My recommended decision and order in this case is based on the testimony presented at the hearing and the documents admitted into evidence (CX 1 to CX 8 and RX 1 to RX 23).

ISSUE

Whether the Respondent, National Welders Supply, violated the employee protection provision of the Act by suspending and then terminating the employment of the Complainant, Mr. Ronald Regan.

Parties' Positions

Complainant²

Having joined National Welders Supply in August 2001, Mr. Regan received delivery assignments in the fall of 2001 that due to the distance and labor involved became difficult to complete within the hours of service limitations established by the U.S. Department of Transportation ("DOT"). On several occasions, Mr. Regan complained to company managers and dispatchers that he couldn't complete the routes and stay within the DOT driving limitations. Those complaints were protected activities under the Act.

In mid-March 2002, due to inadequate directions from the Company, Mr. Regan expended valuable time trying to locate two new delivery locations. Eventually, he ran out of hours and was directed to return home. He then received a three day suspension. That adverse action was caused in part by his previous complaints about being pressured to exceed the hours limitations.

Mr. Regan appealed the three day suspension with a one page letter. In that document sent to Mr. Hansen, he again complained about being pressured to exceed the driving limitations and indicated the situation was recurring. That complaint was also a protected activity. When Mr. Regan returned to work after the suspension, he was fired. Because the adverse personnel action of suspension was turned into a dismissal, Mr. Regan believes the Company fired him because of his additional complaint in the appeal letter.

In other words, this case involves the Company's retaliation for Mr. Regan's protected whistle blowing activities. Granted, Mr. Regan was involved in three incidents within a short period of time. However, Mr. Hansen was aware of all these events and had all the knowledge he needed about them

¹The following notations appear in this decision to identify evidence: CX - complainant exhibit; RX - respondent exhibit; ALJ - administrative law judge exhibit; and, TR - transcript.

²Opening statement (TR, pages 6 to 10) and closing argument (TR, pages 264 to 270).

prior to writing the March 21st suspension letter. Mr. Hansen has offered no explanation for his termination action which occurred just after he suspended Mr. Regan and provided him an opportunity to appeal the suspension. Actually, the only thing that occurred between Mr. Hansen's March 21 suspension letter and Mr. Regan's termination was Mr. Regan's appeal letter. In that appeal, Mr. Regan expressed his concern about how his mistake would affect his hours of service and indicated this situation was a recurring situation.

Mr. Regan indicates that he was terminated on March 28th. Understandably, Mr. Hansen states it occurred on the 26th, thus avoiding the ramifications of having received the appeal letter with Mr. Regan's hours complaint prior to the dismissal decision. The warning letters to other drivers document National Welders Supply's problem with hours of operations limitations. Mr. Regan had previously raised such concerns. When he placed that concern about the recurring situation in his written appeal, Mr. Hansen changed his mind about Mr. Regan and moved from suspension to termination, purportedly because Mr. Regan was uncooperative.

Because the Company took adverse personnel actions in response to his protected activities, National Welder Supply has illegally discriminated against Mr. Regan under the Act. As relief, Mr. Regan seeks lost wages for the three day suspension and lost wages and differential pay for his termination since he eventually returned to work at another company but at a lower rate of pay. Mr. Regan also requests reimbursement of his litigation costs.

Respondent³

Mr. Regan's discrimination complaint under the Act fails for two principal reasons. First, Mr. Regan has failed to establish the existence of a protected activity or a causation nexus, two requisite elements for a *prima facie* case of illegal discrimination under the Act. Neither Mr. Regan's vague, generalized and uncorroborated allegations nor his unspecific appeals of earlier disciplinary actions were complaints covered by the Act as protected activities. Even if Mr. Regan's vague and unsupported assertions or appeals were considered complaints, he is unable to establish the necessary causation element due to both the absence of temporal proximity relating to some of the allegations or the actual failure to communicate complaints the manager who took the termination action. Consequently, that manager discharged Mr. Regan without having knowledge of his complaints. Due to the lack of knowledge about his complaints, National Welders Supply did not base its termination decision on those allegations.

Secondly, the record is devoid of pre-textual evidence. Instead, the greater weight of the evidence demonstrates that due to the cumulative effect of several performance errors by Mr. Regan in March 2002, National Welders Supply ended its work-relationship with him. The Employer's termination action was based solely on performance issues.

Specifically, three events occurred in mid-March 2002 that lead to his separation. First, Mr.

³Opening statement (TR, pages 11 to 19) and April 8, 2003 post-hearing brief.

Regan failed to follow a specified order of delivery and then ran out of hours before all the customers could be serviced. As a result, the Company had to make an emergency delivery. The next day, Mr. Regan skipped a customer without notifying the dispatcher. Again, another emergency delivery had to be made due to his omission. And, finally, when the dispatcher called the next day to present Mr. Regan his route, Mr. Regan refused the assignment on the basis of an hours of service limitation even though, in reality, the assignment would not have caused a violation of the limits.

For the first incident, Mr. Regan received the three day suspension. However, as management considered the subsequent two problems, a decision was made to separate Mr. Regan.

SUMMARY OF EVIDENCE

For the Complainant

Sworn Testimony of Mr. Ronald Lee Regan, Jr.
(TR, pages 41 to 99, 105 to 144, and 257 to 262)

[Direct Examination and ALJ Examination] Mr. Regan is a commercial tractor-trailer driver. He has been driving since 1986 and holds a commercial driver's license, with several endorsements. Mr. Regan started his employment with National Welders Supply in August of 2001. In that capacity, he loaded and unloaded product, made deliveries, conducted vehicle inspections, and performed other tasks associated with driving a commercial vehicle. His wage consisted of mileage, about 36 and a half cents a mile, when driving, and an hourly rate of pay for everything else, such as loading, unloading, and vehicle maintenance.

Initially, Mr. Regan served as a relief driver. He'd report to work and then be given whatever equipment was available. In October, the Company put out work assignments for bids and introduced incentives for night and weekend driving. Interested in the incentive pay, Mr. Regan agreed to work evenings, Monday through Friday. At this time, his schedule became more structured. He usually reported to work, or called in, between 3:00 p.m. and 4:00 p.m to get his work assignment. The trailers were located in Chester, Virginia. The product (oxygen or nitrogen) manufacturing plant was located near the trailers, in Hopewell. Although he had a set delivery routine, the dispatchers, Mr. Grennan or Mr. Parrish, could add stops to his route.

Part of his responsibility included maintaining a driver's log. Each day, a commercial truck driver has to keep track of his time. RX 5 is a copy of his driver's log for September 1, 2001. On the left side of the log, from top to bottom, are four status categories: 1. Off duty, 2. Sleeper berth, 3. Driving, 4. On duty/not driving. The cities listed on the slanted lines are delivery stops. This particular log, during a period when he was a relief driver, shows Mr. Regan went to work at 5:00 a.m. and did pre-trip work for half an hour, drove 15 minutes to the manufacturing facility, and spent an hour and a half of duty time loading product. He then drove an hour to Newport News, and logged more duty time, then on to other delivery stops. When he returned to Chester, he had a breakdown and recorded additional duty time. For that day, the log shows 202 miles for mileage pay

and 7.5 hours pay at his hourly rate of \$14.60.

A truck driver is allowed to be on duty and/or drive, up to a total of 70 hours in eight consecutive days; or 60 hours in seven consecutive days. National Welders Supply used the eight day rule. During that eight day period, a driver can not drive after you have acquired 70 hours. This time is tracked cumulatively in the driver's log book. In terms of daily work, a driver may drive up to 10 hours a day. After 10 hours, the driver must take 8 hours off from driving. A driver can work up to 15 hours in a day, and then must take eight hours off from driving. The 15 hours maximum may consist of on duty and driving time, but the total driving limit for one day remains fixed at 10 hours. At midnight each day, another day would be added and the day eight days prior would drop off.

On occasion, Mr. Regan would not be able to complete an assigned route within these hours restrictions. When that happened, he would work up to the point that he had enough time to return to Chester, Virginia. That is, he would stop in the route and drive back to Chester. He was never directed to lay over while on a route.

On or about November 24, 2001, near Thanksgiving, Mr. Barry Parrish, a dispatcher, asked Mr. Regan to make a top line, or off-duty, entry so he could make a scheduled delivery. Most of the drivers for National Welders Supply "top-lined." In other words, on that day, Mr. Regan only had six hours available to work or drive. Mr. Parrish's request meant Mr. Regan would be on duty and working, but logging the time as "off duty" in order to preserve the six available hours for driving. Mr. Regan responded that he didn't have sufficient hours to work that day and he declined to "top line." Mr. Parrish replied, "that's fine." He wasn't upset.

Again, in January 2002, the same thing happened. All the drivers were called to Charlotte, North Carolina for a safety meeting. Because he had worked the night before, Mr. Regan had completely run out of all three limits: 70 hours, 10 hours, and 15 hours. At the meeting, Mr. Parrish asked Mr. Regan to drive to the Company's facility. When Mr. Regan informed Mr. Parrish that he was out of time, Mr. Parrish didn't respond. Later during the meeting, Mr. Regan explained his situation to Mr. Joe Grennan, another company dispatcher. Mr. Grennan told Mr. Regan to take eight hours off and then return home. Mr. Regan did that but it still was a violation because even with the eight hour layover he "didn't have enough time in the 70 hours to do that."

On another occasion on a Sunday, Mr. Parrish called him to do "city work" which means drive a truck around locally and release excess oxygen. When Mr. Regan said he didn't have enough time to do that on Sunday and then be able to drive on Monday, Mr. Parrish stated it was just city work and he should top line it. When Mr. Regan declined to top line the Sunday work, Mr. Parrish said ok and dropped the request.

Mr. Regan believes his refusals to comply, with the exception of his lay over in Charlotte, to these multiple requests to top line represent safety complaints.

On March 13, 2002, by telephone, Mr. Parrish assigned Mr. Regan a route in the Raleigh-Durham area. He picked up his truck in Chester and then went to the product plant. His typical

route was to go to Cree Research and unload. The next stop was to be Wilson, North Carolina for a delivery. Then, he would go on to Garysburg, North Carolina (Sanfilpo) for another delivery before returning to Chester. However, on this day, two new stops were added. He had a second product pick-up in Cary and another stop in the Wilson, North Carolina area. He had never been to either location. When he asked for directions for the Wilson location, Mr. Parrish told him to drive on 301 North to the second red-light and turn left. Mr. Regan did not consider his directions helpful.

In assigning the trip, Mr. Parrish told Mr. Regan to go to Cree Research, Cary, Wilson, and Garysburg. But, he didn't specifically say to do it in that order. Since he was already familiar with the regular stops, Mr. Regan decided to go to the new locations first. So, after receiving better directions from his wife, who used the internet to obtain the information, Mr. Regan went to Cary, then Wilson. At Wilson, Mr. Regan concluded that he was going to run out of time before finishing the route, and he called Mr. Parrish. Mr. Parrish was very angry that Mr. Regan did not go to Cree Research first. He told Mr. Regan to return to Chester. Mr. Regan finished his stops in Wilson and returned to Chester. He did not go to Cree Research or Cary, North Carolina, on that trip.

Mr. Regan's total mileage for that trip on March 13 and 14, 2002, was 197 miles. He ran out of time because of the 70 hour limitation. When Mr. Parrish assigned the route, Mr. Regan didn't tell him about a limitations problem. Around 11:00 p.m. on the 13th, Mr. Regan did a log recap and then discovered that he didn't have the six or seven hours that he thought he had to do the route with the extra stops. Mr. Regan recaps his log whenever he thinks there's going to be a problem.

Initially, Mr. Regan thought he had a full 15 hours to do the work. However, it took a long time to get directions and find the new delivery location in Wilson. According to his log entry, RX 5, he started driving at 6:00 p.m. and finished the route on the 14th at 3:00 a.m.

Later on the 14th, at 6:00 p.m., Mr. Regan drove a new dispatch involving city work in the Richmond, Virginia area. Then, about 4:00 p.m. on the night of Friday, March 15th, Mr. Parrish called him to drive. He informed Mr. Parrish that he was completely out of hours. Mr. Parrish replied by asking why Mr. Regan was the driver who was always out of hours. Mr. Regan told him that's what he had recorded in his driver's log and those entries were accurate. Mr. Parrish then asked if Mr. Regan would pick up available time at midnight, Saturday. Mr. Regan said yes but informed Mr. Parrish that he wasn't required to work on his day off, which was Saturday. So, he declined the dispatch. On that Friday, his regular work day would have started at 4:00 p.m. and continued until whenever it finished on Saturday. However, Mr. Parrish was asking him to start his work day on Saturday. Mr. Parrish stated he would consider Mr. Regan's response as a refusal to work.

Concerned about his conversation with Mr. Parrish, Mr. Regan called Mr. Mike Hansen, who was Mr. Parrish's boss, and asked him to intervene. In response, Mr. Hansen indicated that if Mr. Regan refused the dispatch, he was going to fire him for refusal to work. So, Mr. Regan accepted the dispatch. Neither Mr. Parrish nor Mr. Hansen asked him to do anything wrong. However, Mr. Regan didn't drive the dispatch because Mr. Parrish assigned it to another driver.

Reviewing CX 2, a memo that Mr. Regan assumes was written by Mr. Hansen, Mr. Regan agrees with its contents but notes there is no mention of the dispatch he completed that Friday morning.

As set out in CX 1, dated March 21st, Mr. Hansen suspended Mr. Regan for three days due to the events of March 13 and 14, 2002, effective March 25. He did not receive any pay for those suspended days. Since the last paragraph of the letter mentioned an opportunity to appeal, Mr. Regan did so. The suspension letter was sent to him by Federal Express. During the week between the refusal to work issue on March 15th and his receipt of the suspension letter, Mr. Regan worked five days. After receiving the suspension notice, Mr. Regan did not talk to either Mr. Parrish or Mr. Hansen. He did speak with the Company's labor relations specialist, Ms. Stinson. He then wrote his appeal and e-mailed it.

CX 3 is Mr. Regan's appeal letter, which he dated and wrote on March 26, 2002. He mailed the letter to Mr. Hansen and attached a copy of the letter as a file to an e-mail message addressed to Ms. Pat Stinson (RX 6). He did not have Mr. Hansen's e-mail address. In his appeal letter, Mr. Regan attempted to explain the mix-up that occurred on March 13th and 14th. He also expressed his concern about spending so much time trying find the new stops that it would adversely affect his hours of service. He was further distressed at the recurring situation of running out of time all the time. Mr. Regan was being assigned so much work that he could "never, ever complete. . . within the hours of service." Mr. Regan felt that he was being forced into a position "where I had to falsify the logs." This concern touches on safety if a driver is "out there driving" after being on duty 20 hours.

After the expiration of the three day suspension, Mr. Regan called Mr. Parrish to get his work assignment. Mr. Parrish put him on hold and then Mr. Hansen and Ms. Stinson got on the phone. At that time, Mr. Hansen fired Mr. Regan. Mr. Hansen explained that Mr. Regan was uncooperative and there was no appeal for the three day suspension or the termination. Mr. Hansen said he had read the appeal letter. Mr. Regan also observed Mr. Hansen's reference to no appeal included the suspension. Mr. Regan asked him to reconsider, but Mr. Hansen still terminated him effective March 28th.

Mr. Regan received his salary bi-weekly and grossed between \$1,800 to \$2,400. The three day suspension cost him about \$600 in lost wages. After his termination, Mr. Regan was out of work for about 10 days before finding part-time employment with a former employer. He stayed there from April 2002 to February 2003, earning between \$11.00 and \$14.50 an hour. His net bi-weekly salary during this period was about \$700 to \$800; the gross pay could range from \$500 to \$1,400. Mr. Regan now works for a different employer; his bi-weekly gross is about \$1,200.

[Cross Examination] As documented by RX 1, on August 6, 2001, Mr. Regan acknowledged receiving the Company's handbook for employees. In RX 2, dated January 16, 2002, Mr. Grennan informed Mr. Regan that he had exceeded his hours of operations limitation by a quarter hour in December 2001. Prior to that time, Mr. Regan had not received an hours violation notice. Mr.

Regan agreed with that determination.

As a commercial truck driver, Mr. Regan is responsible for completion of his log. After creating the log, he sent a copy to Chester Operations and apparently Mr. Grennan would review it.

RX 3, dated February 20, 2002, is a notice from Mr. Grennan that Mr. Regan exceed the 70 hour limit three times in January 2002. Mr. Regan disagreed with a portion of the assessment concerning the purported violation on January 9 because he didn't exceed the 70 hour limit. Mr. Grennan must have misread his log. RX 4, dated March 7, 2002, is another violation notice.

On his normal duty day, Mr. Regan would come to work between 3:00 p.m. and 6:00 p.m. and continue through to the next day to perhaps 6:00 a.m. and 7:00 a.m. This time frame also applied when he reported to work on Friday.

On March 13th, when Mr. Regan received his dispatch from Mr. Parrish, it said go to Cree Research and then continue to other locations. Mr. Regan had made previous deliveries to Cree Research. When Mr. Parrish gave him the list of locations, he did not indicate the route had to be followed in the order presented to him. Mr. Parrish did not direct Mr. Regan to go to Cree Research first. Instead, Mr. Parrish said, "Go to Cree, reload, continue to Torpedo Wire and Sanfilpo. In the suspension notice, dated March 21, 2002, Mr. Hansen stated that Mr. Parrish dispatched Mr. Regan first to Cree Research, reload at MG Industries, then delivery to Torpedo Wire and John Sanfilpo. That was the dispatch Mr. Regan received from Mr. Parrish. When he changed the order, Mr. Regan did not ask Mr. Parrish.

When Mr. Regan accomplishes a pre-trip, it usually takes 30 minutes, unless there's a problem. Referring to RX 5, on March 13th, the log shows Mr. Regan came on duty at 4:30 p.m. He didn't start his trip to North Carolina until 6:30 p.m. That entire two hours was not just a pre-trip. Mr. Regan also went to the plant to get directions and other paperwork. At 6:30 p.m., he departed and drove to Garysburg, the location of John Sanfilpo. Next, he traveled to Torpedo Wire in Rocky Mount. He called Mr. Parrish around 11:00 p.m. and told him that due to running out of hours, Mr. Regan would not make the Cree Research delivery. After yelling at Mr. Regan, Mr. Parrish told him to return to Chester. When he departed at 6:30 p.m., Mr. Regan was comfortable with the directions to Torpedo Wire.

At the end of his drive on the morning of March 15th, around 7:00 a.m., Mr. Regan called Mr. Parrish and left a voice message which included a report on his hours of availability. Mr. Regan informed Mr. Parrish that he hadn't completed his delivery assignment in Durham because he ran out of time and would remain out of time for the rest of the day. Although he typically would call Mr. Parrish in the afternoon of his work day, Mr. Regan did not do so that day because he thought Mr. Parrish would know that he was out of time. Mr. Parrish called him that afternoon. He claims that he did not get the voice message. The assignment was a run to Newport News.

Mr. Regan never complained in writing to anyone, or management, at National Welders

Supply that he was being asked to falsify his hours logs. He never made those complaints because whenever he was disciplined and requested an appeal, the appeal was never heard. He also never made any complaint to DOT, or any other agency, about being asked to falsify logs.

Mr. Regan believes his termination occurred on Thursday, March 28, 2002.

Following his termination, Mr. Regan made an effort find work with four or five other companies. He did not receive any employment offers. While he worked at Transforce between April 2002 and February 2003, in an effort to make more money, he continued to look for other work and contacted about 15 companies. No one hired him. His weekly work at Transforce varied from 16 to 70 hours a week. Transforce is a temporary staffing company that supplies drivers. He started work with his present employer on February 24, 2003 and makes \$15.00 an hour, but does not received a mileage payment.

[Redirect Examination] When Mr. Parrish gave Mr. Regan the route on March 13th, "he told me to go to the stops like they're listed." He gave the route in the order stated in the disciplinary memo, CX 1. However, Mr. Parrish did not tell him the stops had to be actually made in the stated order. From Mr. Parrish's information, Mr. Regan did not believe it was essential that the stops be made in the exact order. Mr. Regan did not know he had to go to Cree Research first because the reloading location, MG Industries, didn't provide medical grade nitrogen after 4:00 p.m. If he had known that information, Mr. Regan would have gone to Cree Research first.

On RX 3, Mr. Regan disagrees with the purported hours violation on January 9, 2002 because when he did a recap, he discovered four more hours were available before the 70 hour limit. When he informed Mr. Parrish, Mr. Parrish gave him an assignment that permitted him to drive to the location. But he had to sit at the delivery location until midnight when he picked up more hours and could drive back. Thus, he never violated the 70 hour limit because he actually stopped when he ran out of time.

Concerning the alleged violations on RX 4, Mr. Regan disagrees with all of the stated dates. He never drove past the 70 hours limit. Instead, he would stop, wait until midnight, and then continue. Yet, the time he was waiting until midnight was still recorded as on duty because he was still watching the truck.

The reason Mr. Regan never submitted his complaints was because Mr. Grennan didn't respond to his request for an appeal. He asked for an appeal and did not actually submit the appeal because he's "not going to give him my game plan and let him – I wanted to be heard. I wanted to go document it to people outside the department what was going on." Mr. Regan believes the appeal would establish that he was being assigned too much work and the other drivers were being pressured to log off duty. Mr. Regan developed this impression because Mr. Grennan had stonewalled him in January. He did not contact Mr. Hansen about the problem, because he "wanted it to be heard in the appeal."

[Recross Examination] In his job, Mr. Regan had been allowed to make decisions on his own on the order of his deliveries unless specifically told to go to one location first. He was unaware that

Cree Research required medical grade nitrogen.

[Rebuttal Direct Examination] On the day he was to make a delivery to Sphinx, Mr. Regan got stuck in another company's security area for two and a half hours waiting for the security guard to come back and let him out. He did not forget the delivery at Sphinx. He just ran out of hours. Because Mr. Hansen had instructed him to contact Mr. Parrish if something couldn't be done, Mr. Regan believes he called Mr. Parrish about the missed delivery.

Mr. Regan believed that he would not be required to work on his scheduled days off. His days off were Saturday and Sunday. So, whenever he finished a route started on Friday, which could be the early morning hours of Saturday, Mr. Regan was off until he was scheduled to go back on Monday afternoon. In January, he discussed his days off with Mr. Hansen because he had been directed to drive on a day off. Mr. Hansen agreed that Mr. Regan did not have to work on his days off.

[ALJ Examination] In Mr. Regan's opinion, Mr. Parrish's inquiry on whether he gained hours at midnight did not represent a request to run a delivery the second part of his work day.

CX 1 - March 21, 2002 Disciplinary Action

In a March 21, 2002 Disciplinary Action letter, Mr. Hansen informed Mr. Regan that he was being assessed 10 points under the Company's drivers' incentive program due to his conduct that was not in the best interest of the company. He also placed Mr. Regan on unpaid leave for three days, effective Monday, March 25, 2002, due to the problems associated with his route on March 13th and 14th.

Specifically, Mr. Hansen observed that Mr. Parrish gave Mr. Regan his routing in a specific order. Although Mr. Regan altered that sequence of deliveries, he did not tell Mr. Parrish about revised delivery order. When Mr. Regan later informed Mr. Parrish about his hours limitation, Mr. Parrish informed him that due to the revised order of deliveries, Mr. Regan would not be able to deliver the proper product to the remaining customer. Mr. Parrish had to assign another driver.

Mr. Regan's unilateral reversal of the delivery order caused undue hardship for the dispatcher and other drivers. He also exposed a major customer. Further, according to his log entries, Mr. Regan spent two hours in Chester prior to departing for his trip even though the trailer was fully loaded and no mechanical problems were reported.

In addition to the points and suspension, Mr. Regan was advised that further inappropriate actions might lead to more severe disciplinary action, including termination. Mr. Regan was given 15 days from receipt of the letter to appeal the decision.

CX 2 - March 16, 2002 Memo

According to the memo, the previous evening when Mr. Parrish attempted to assign Mr. Regan to a short, but imperative, run, Mr. Regan indicated that he was out of hours for Friday and would not work on his day off. Even though Mr. Regan would pick up hours at midnight, he still refused to accept the assignment from Mr. Parrish. Mr. Parrish indicated his continued rejection would be considered a refusal to accept a dispatch. Mr. Regan called Ms. Stinson, complaining that he had been asked to work on his day off. Ms. Stinson then had Mr. Hansen contact Mr. Regan. Mr. Hansen spoke to Mr. Regan about the days off for a night driver. After considerable conversation, Mr. Regan agreed to accept the assignment.

CX 3 - March 26, 2002 Letter

In a letter, dated March 26, 2002, to Mr. Hansen, Mr. Regan appealed the suspension decision. Mr. Regan reversed the order of the dispatch due to unfamiliarity with the locations of both MGI and Torpedo Wire and a desire to get as much as the run done as possible by going to the unfamiliar places first. At that time, he had not been told to run the route in a specific order; and, he was unaware of the difference in gas product between suppliers.

When he first contacted Mr. Parrish, Mr. Regan indicated that he had driven to the plant for specific directions to MGI and Torpedo Wire but was unable to obtain the information. Mr. Regan stated:

I was really concerned that I would not be able to find Torpedo Wire and the time consumed would effect [sic] my hours of service. On the way to North Carolina, distressed with this recurring situation, I decided to call my wife and she graciously took time to find directions to Torpedo Wire on the internet.

Mr. Regan called Mr. Parrish as soon as he became aware he would not have enough time to complete the run. Mr. Parrish lost his temper and ordered Mr. Regan home. Had Mr. Parrish not lost control, Mr. Regan believes he would have had enough time to go to Chester for the product and then deliver it to Cree Research.

Mr. Regan resented being disciplined because the dispatcher was unprofessional. Mr. Regan did not intend to impose any hardship on the Company. He requested restoration of his pay for the three days and removal of the assessed points.

CX 4 - March 6, 2002 Facsimile

In this facsimile, Mr. Regan informs Mr. Grennan, "I request an appeal to your decision."

CX 5 - Mr. Regan's Daily Log

This Driver's Daily Log contains multiple carbon entries relating to Mr. Regan's work as a driver for National Welders Supply from October 28, 2001 to December 1, 2001. The log sets out four categories of time entries. The first, or top, entry is entitled "off duty." Under this category of time, a driver is: a) not on duty; b) not required to be in readiness to work; or, c) not under any responsibility for performing work. The other three categories for time entries of sleeping berth, driving, and on duty/not driving, are essentially self-explanatory. The inside cover of the log contains four columns that record Mr. Regan's status, in regards to commercial driving for each day of the month. The first column show the total hours worked on that day. The next three columns, for the same day, are labeled "A, B, and C" under the heading, "70 HR/8 DAY, DRIVERS ONLY." Column A records the total hours on duty the last 7 days. Column B shows the "total hours available tomorrow (70 hours minus Col. A)." And, Column C shows the "total hours on duty last 8 days." The times are to be recorded in each column at the end of each day. The inside cover further explains that if any number in Column C exceeds 70, "no driving should have been done. Any driving that was done is a violation and should be circled for easy identification."

CX 6, CX 7, and CX 8 - Mr. Regan's Daily Logs

These three log books record Mr. Regan's driving activities from December 1 to December 31, 2001, January 11 to January 29, 2002, and January 31 to February 28, 2002, respectively.

For the Respondent

Sworn Testimony of Mr. Barry Parrish
(TR, pages 144 to 205)

[Direct Examination] Mr. Parrish is the Dispatcher Supervisor for National Welders Supply. He reports to Mr. Grennan and Mr. Hansen. The Company produces three types of gas, oxygen, nitrogen, and argon, and delivers the gases to various types of customers in a five state region, numbering about 1,300, including hospitals, military installations, welding industries, and other businesses. As a dispatcher, Mr. Parrish schedules 45 drivers for the Company. When at work, he is usually setting the schedule for the next day. The Company operates seven days a week all year long and has two shifts for its drivers: day and slip seat. The later group reports in between 3:00 p.m. and 8:00 p.m.

Part of Mr. Parrish's responsibilities is to monitor through a computer system the level of gases in its customers' tanks. Some of the gas supplies are critical, such as the oxygen provided to hospitals, or nitrogen at production facilities. Insufficient amount of product can adversely affect the customers' operations. He also receives a significant number of daily calls from customers requesting more product.

The Company's drivers are responsible for making a pre-trip inspection of their vehicles, loading their trailers, and delivering product. Slip seat drivers usually finish their work day in the

early morning hours of 3:00 a.m. to 6:00 a.m. Mr. Parrish communicates the day drivers' assignments through their voice mail system. The slip seat drivers usually call him for their trips.

Under the DOT hours of operation rules, a driver is not allowed to work more than 70 hours in an eight day period. He is also not allowed to work more than 15 hours in any given day or drive more than 10 hours in a day. The driver is responsible for maintaining his own hours log. The drivers keep Mr. Parrish informed of their hours situation. They must inform him as soon as they know their hours are possibly low. Each National Welders Supply location with drivers has a binder with driving instructions to its customers.

Mr. Regan never complained to Mr. Parrish about being forced to falsify his hours logs or top line his time. Mr. Parrish has never asked any driver to falsify any paperwork.

RX 9 is one of Mr. Regan's routes. One of the Company's customers was relocating and would no longer be on the route which meant Mr. Parrish would replace that company on Mr. Regan's run with another customer. His normal work week would start on Monday afternoon and end Saturday morning.

RX 23 is a dispatch sheet that Mr. Parrish prepared. The top sheet is for March 13, 2002 and second page covers March 14, 2002. Mr. Regan called in about 3:00 p.m on March 13th. The sheet shows that Mr. Regan was to take nitrogen from National Welders Supply's plant and deliver it to Cree Research. Then, he was to go to MGI to pick up product and deliver it to Sanfilpo and Torpedo Wire. On this day, it was important that Cree Research was the first stop because it would accept only medical grade nitrogen. If product was picked up at MG after 4:00 p.m, the product would not have the necessary paperwork to show it was medical grade and consequently Cree Research wouldn't accept the nitrogen. After reviewing RX 5, Mr. Parrish doesn't know why Mr. Regan logged two hours for the pre-trip which usually takes 30 minutes.

On March 13th, Mr. Parrish told Mr. Regan to go to Cree Research, to MGI, and then deliver product to Sanfilpo and Torpedo Wire. Mr. Hansen was present in Mr. Parrish's office and heard the conversation on a speaker phone. Later in the afternoon or early evening, Mr. Regan called in with a concern about directions to Torpedo Wire, indicating that they were vague. Other drivers had been able to follow the directions, so Mr. Parrish told him to follow the directions that he had been given. At that time, Mr. Regan did not indicate he was changing the delivery order. Later in the evening, around 11:00 p.m., Mr. Regan called again, indicating he had reversed the delivery order. He had delivered to Sanfilpo and Torpedo Wire but was running out of time. Mr. Parrish told Mr. Regan to bring the truck back to Virginia. He needed Mr. Regan back in Virginia so the truck could be available to make a delivery to Cree Research before they ran out of product. It didn't matter then whether Mr. Regan had run out of hours because he didn't have the proper product for Cree Research. The second page of RX 23 shows that the other driver, Mr. Hicks, made the delivery to Cree Research.

Because of the low product level at Cree Research, Mr. Parrish called his supervisor, Mr. Grennan, about the problem with the delivery. The next morning, Mr. Hansen was informed of the problem.

According to RX 23, the next day, March 14th, Mr. Regan was scheduled to make several deliveries. Later, Mr. Parrish received a call from one of the scheduled customers indicating they had not received their product. Mr. Regan had failed to make two of the scheduled deliveries and did not notify Mr. Parrish of the missed deliveries. Drivers are going to miss stops. However, if they do not make a delivery, the drivers are required to inform Mr. Parrish. Failing to make a delivery is embarrassing to National Welders Supply and erodes its customers' trust in the Company. When Mr. Parrish talked to Mr. Regan about that assignment, Mr. Regan acknowledged he did not make the two deliveries. Initially, he said he forgot to tell Mr. Parrish, but later withdrew that comment by indicating he had left a message on Mr. Parrish's voice mail. Mr. Parrish never found such a message in his voice mail.

On March 15th, after he hadn't heard from Mr. Regan, Mr. Parrish called him. Mr. Regan indicated he was out of hours and could not go out. When Mr. Parrish asked about the number of hours that he would pick up at midnight, the amount available would allow Mr. Regan to make the run to Newport News. Since the hospital in Newport News needed oxygen, he told Mr. Regan that he must make the run. Mr. Regan still refused. Finally, Mr. Parrish informed Mr. Regan that his refusal would be considered a refusal of a dispatch. Mr. Regan again declined. Mr. Parrish stopped the conversation and found another driver, who came in on his day off, to take the run. Later, Mr. Hansen called and said Mr. Regan had agreed to drive. By then, it was too late; Mr. Parrish had assigned the run to the other driver. Mr. Regan is the only driver who has ever refused a dispatch from Mr. Parrish. He believes some drivers in the past have been terminated for a refusal of a dispatch.

[Cross Examination] Referring to the bid run list, RX 9, if Mr. Parrish gave that assignment to Mr. Regan verbally, he'd recite the delivery locations in order. Yet, he is also aware that Mr. Regan often alters the delivery order of those customers when he drives that bid run. Mr. Parrish explained that on this particular assignment the customers are within two miles of each other so he lets the drivers decide the actual sequence of the deliveries.

Mr. Parrish did not prepare CX 1. He did furnish Mr. Hansen the information for the document. The delivery schedule on CX 1 is the exact order Mr. Parrish gave Mr. Regan. Concerning the exact order of the Sanfilpo and Torpedo Wire deliveries, he believes he told Mr. Regan Sanfilpo first, Torpedo Wire next. The order on CX 1 about these two customers is reversed.

On March 13th, when Mr. Regan called in the second time, he had neither the correct product for Cree Research nor sufficient time for the delivery. If Mr. Regan had the correct product but no hours, Mr. Parrish would have told him to stop for the night. When a driver tells him that he is out of time, Mr. Parrish instructs the driver to lay over. Some drivers do call him when he gives them assignments that might exceed their remaining hours of service. In those cases, he changes the assignment.

Upon reflection, Mr. Parrish probably told Mr. Hansen about the March 14th missed deliveries the following Monday but he could've possibly passed on the information by telephone on

Friday, the 15th.

The deliveries to Sanfilpo and Torpedo Wire were probably new locations for Mr. Regan. Mr. Parrish did not give him the directions. When Mr. Regan called about them, he already had the instructions. The binder information for those locations contains more information.

Prior to the suspension action, Mr. Parrish, Mr. Grennan, and Mr. Hansen talked about what had happened with the Cree Research delivery problem. Mr. Parrish provided the information to the group. The decision belonged to Mr. Hansen. Mr. Parrish knew Mr. Regan was going to be suspended before Mr. Regan because he had to make the schedule. Mr. Hansen told him about the suspension.

Mr. Parrish is sure he told Mr. Hansen about the two missed deliveries prior to the date of the suspension notice, March 21.

[Redirect Examination] If Mr. Regan had gone to Cree Research first, then the order of delivery to Sanfilpo and Torpedo Wire would not have mattered.

[ALJ Examination] Mr. Parrish doesn't recall ever starting Mr. Regan on his work day at midnight. But if a customer needs a delivery, Mr. Parrish would start a driver that late. Although National Welders Supply has 1300 customers and 45 drivers, Mr. Parrish has never been in a situation where he has run out of drivers.

Mr. Michael G. Hansen
(TR, pages 205 to 256)

Educated as an engineer, Mr. Hansen now has 30 years experience in the industrial gas business. He entered his present position as the General Manager of Distribution for National Welders Supply in January 2002. In that role, Mr. Hansen exercises complete operational management authority for the Company's bulk distribution activities which supplies about 1,200 customers from two production facilities located in Chester, Virginia and Columbia, South Carolina. More than 40 drivers make the bulk deliveries. Although he has decision authority over all personnel functions, including hiring, guidance, discipline, and termination, Mr. Hansen consults with the Company's Human Resources Department.

The Department of Transportation regulations, known as C.F.R. 49 and the Federal Motor Carrier Safety Regulations, serve as the "Bible" for the transportation industry and National Welders Supply. Because the Company operates seven days a week, its drivers fall under the regulation's 70 hours in eight days limitation. Additionally, the regulations limit driving more than 10 hours at one time and staying on duty more 15 hours. After reaching either of the latter two limits, a driver must have a minimum of eight hours off duty before he can drive again. These limitations have some flexibility to address emergency situations and adverse weather. Another exception is called "relieved of duty" status, which the drivers sometimes call top-lining. A driver is in "relieved of duty status" when, "on a pre-defined basis," he has relinquished control of a vehicle/cargo or is taking a meal break. When in "relieved of duty" status, a driver is still paid for that time.

National Welders Supply supplies each of its new drivers a copy of the C.F.R. 49 regulations. Additionally, the Company has an incentive program that awards drivers for their compliance with the hours of service regulations. If a driver runs out of time while on the road, he should layover. In that situation, they must inform the dispatcher so that he will know when they will return to duty status. During Mr. Hansen's tenure, neither the DOT nor any other regulatory agency has investigated National Welders' Supply. The Company is subject to periodic audits. Based on its assessment of a company's regulatory compliance, DOT issues an annual letter stating whether its compliance is satisfactory, conditional, or unsatisfactory. If National Welders Supply received an unsatisfactory rating, it would be out of business. Again, during his time with National Welders Supply, all of the Company's ratings have been satisfactory.

Although each driver is required to complete and audit his own hours of service log, National Welders Supply reviews the logs, in part, to determine payroll. Along with other trip documentation, each driver submits a copy of his log to the Company. The recorded hours are entered into a computer program. If the Company's review shows a driver has gone over the 70 duty hours in 8 days, 10 driving hours in 24 hours, or 15 duty hours in 24 hours, the Company may take a disciplinary action. Mr. Regan was written up about three times for hours of service violations. Usually, the first letter serves as a warning. The second and subsequent letters during a 12 month period result in points being assessed against the incentive program. Other drivers have received write-ups for hours of service violations.

In response to one of the violation notices, Mr. Regan did respond with a cryptic note on the letter stating, "I appeal." Later, Mr. Hansen overheard a conversation between Mr. Grennan and Mr. Regan in which Mr. Grennan explained that an appeal should provide some detail concerning why the employee disagrees with the disciplinary action.

In the Fall of 2001, prior to Mr. Hansen's arrival, Mr. Regan took some unpaid leave time for a family illness. Eventually, in early March 2003, about March 3 or 4, Mr. Hansen and representatives from Human Resource Department met with Mr. Regan to exchange expectations about his work schedule. During that meeting, Mr. Regan did not raise any complaint about being asked or directed to falsify his service log.

On Wednesday, March 13th, Mr. Hansen was in Mr. Parrish's office and heard the dispatch to Mr. Regan. Mr. Parrish instructed Mr. Regan to load product at Chester and then go to Cree Research. Next, Mr. Regan was to proceed to MGI for additional product and then continue back up Interstate 95 to make deliveries to Torpedo Wire and Sanfilpo. Upon completion of the route, Mr. Regan was to return to Chester.

The next morning, Mr. Parrish informed Mr. Hansen that around 6:00 p.m. the night before Mr. Regan called him for clarification of directions to the two accounts in the Rocky Mount/Garysburg area. Then, around 11:30 p.m., Mr. Regan called Mr. Parrish, stating he had completed his two deliveries in Rocky Mount and asked how he could get to MGI to reload. That situation posed a major problem because Cree Research, the second largest customer of National Welders Supply, requires specific documentation to accompany its nitrogen delivery and MGI could not provide that documentation after 4:00 p.m. Effectively, by reversing the order of his assigned

route, Mr. Regan would have to return to Chester to obtain documented nitrogen and drive to Cree Research for delivery and then return to Chester. Since the conversation between Mr. Parrish and Mr. Regan established that Mr. Regan did not have sufficient DOT hours remaining to accomplish the Cree Research delivery, Mr. Parrish directed him to just return to home. Regan returned to Chester around 3:00 a.m. Mr. Parrish had to call in another driver to pick up product and deliver it the Cree Research. The delivery arrived “in the nick of time.”

In the afternoon of Friday, March 15th, about 5:00 p.m. Mr. Hansen received a call from Ms. Stinson in Human Resource indicating that Mr. Regan had called her regarding his dispatch for that evening. She requested that Mr. Hansen get involved. Mr. Hansen then called Mr. Parrish who explained that since he had not received the expected dispatch call from Mr. Regan, he called Mr. Regan. Mr. Parrish told Mr. Regan that he had a short, but necessary, run to Newport News. Mr. Regan responded that he had no hours for that day. However, Mr. Parrish ascertained that Mr. Regan would pick up driving hours at midnight and could well make the run. Mr. Regan refused the dispatch.

Mr. Hansen then called Mr. Regan and talked about 20 to 30 minutes. He reminded Mr. Regan about the scheduling discussion in early March and that as a night driver, his scheduled work period began in the afternoon or early evening and stretched into the morning of the next day. So, although he had no hours for the first part of that work period, a six or seven hour run starting in the second half of the period would not “appreciatively” change the normal time he would return home and finish his Friday night/Saturday morning work schedule. They discussed the issue over and over until Mr. Hansen stated Mr. Regan’s persistent refusal to take the route would be considered a refusal of dispatch, which the Company viewed as an insubordinate act subject to “very severe disciplinary action.” Mr. Regan “relented” and agreed to take the assignment. However, when Mr. Hansen called Mr. Parrish about his acceptance, Mr. Parrish indicated that he had found another driver to make the delivery. So, Mr. Hansen called Mr. Regan back and told him not to worry about the trip because it was already covered. He added they would “talk about it some more.” CX 2 is his memorandum about the episode. Mr. Hansen wrote it on a computer on “Monday, March 19th.”⁴

On Monday morning, March 18th, Mr. Hansen was informed that because Mr. Regan had failed to make an assigned delivery, another driver had to be dispatched on Sunday, March 17th, to make the delivery at Sphinx Pharmaceutical. National Welders Supply relies on its drivers to make multiple deliveries during their routes. If for some reason a driver is unable to make an assigned delivery, he needs to let the dispatcher know because the missed customer probably still needs the delivery. Due to the missed delivery, the Company had to make an emergency dispatch to get product to the customer.

As Mr. Hansen investigated the events of March 13th and 14th, during the early part of the following week, he talked to plant personnel about when the trucks were loaded. Additionally, since Mr. Regan recorded two hours on duty on the 13th prior to his departure from Chester, Mr. Hansen

⁴March 19, 2002 was a Tuesday.

questioned maintenance personnel about his truck and trailer. He discovered that the trailer was pre-loaded and the truck was ready to go. No maintenance issues were noted. It took Mr. Hansen into the early part of the following week⁵ to put the pieces together and develop a “thorough chronology.”

RX 21 is the chronology he developed. Mr. Hansen then “composed a letter” to Mr. Regan indicating his actions were a serious infraction which caused substantial difficulty for the Company and potentially exposed a customer. As a result, Mr. Hansen imposed a suspension and cautioned that additional infractions could be subject to more severe disciplinary responses.

CX 1 is the suspension letter to Mr. Regan. The document only covered the March 13th incident. Mr. Hansen’s investigations concerning the March 15th incident and the other missed delivery had not been completed. Mr. Hansen had not reached any conclusions about them. The letter was sent Federal Express to be delivered on March 21st.

In regards to investigating the missed delivery to Sphinx Pharmacies, Mr. Hansen spoke to Mr. Parrish and Mr. Grennan. He also wanted to see copies of Mr. Regan’s logs to determine where and when he went during that dispatch. He also reviewed the Company’s disciplinary policy set out in the employee handbook. In particular, Mr. Hansen observed that while the Company may take a stepped approach to discipline, that approach may not necessarily be applied depending on the significance and severity of the infraction. Some actions such as “refusal of work, insubordination” are specifically cited as reasons which may warrant immediate termination.

Mr. Hansen reached his decision to terminate Mr. Regan the weekend of March 23th and 24th. After considering the “three in sequence severe infractions” by Mr. Regan, Mr. Hansen concluded the relationship between the Company and Mr. Regan was “just not functioning.” Mr. Hansen also noted the three incidents had occurred despite the early March 2002 conversation with Mr. Regan about his schedule. On Monday afternoon, March 25th, Mr. Hansen discussed the situation with Mr. Sheridan, Vice President of Human Resources. Mr. Hansen explained the sequence of events and his ultimate conclusion. Mr. Sheridan agreed and suggested the action should be taken as soon as possible. Mr. Hansen should inform Mr. Regan that his employment was being terminated because their relationship was not functional.

So, the next afternoon, March 26th, about 3:00 p.m. or 4:00 pm., Mr. Hansen, with Ms. Stinson present by conference phone, called Mr. Regan about the termination.

Mr. Hansen received Mr. Regan’s appeal of the suspension, RX 6, on his computer at “4:08 p.m” on March 21st. Mr. Regan had sent the appeal by e-mail to Ms. Stinson who subsequently forwarded it to him. He was unaware of the e-mail’s contents prior to telling Mr. Regan that he was terminated. The letter version of the appeal arrived a few days later. The contents of the appeal would not have altered his termination decision.

RX 17 and RX 18, reflect Mr. Hansen’s discipline of other drivers about changing their

⁵The Monday of that following week was March 18th.

dispatches.

[Cross Examination] Mr. Regan's suspension was effective March 25th to March 27th. Mr. Hansen called him on the 26th to fire him. In light of the three incidents and the concurrence of Mr. Sheridan, Mr. Hansen decided not to prolong the situation.

By March 25th, Mr. Hansen had completed his investigations of all three incidents. Mr. Regan's appeal letter would have more fully completed the first investigation if the other two events had not occurred. (At this point), Mr. Hansen stated the Sphinx non-delivery incident occurred on the night of the 14th, not the 16th.

Although he was aware of all three incidents when he wrote the March 21 suspension letter, Mr. Hansen was not "completely satisfied" that he knew all aspects of the situations. The letter did not address the other incidents because he was not satisfied with the other investigations. The purpose of the letter was to address one, discreet, incident. Some of the material he requested, such as log books, had to be mailed to him and he was still waiting for their arrival. When Mr. Hansen reviewed Mr. Regan's log for the 15th and 16th, he concluded Mr. Regan still had 30 minutes of driving available that Friday night. So, he could have started driving at 11:30 p.m. Mr. Parrish wanted him to start as soon as possible. In their phone call, Mr. Regan expressed his concern that the requested route would impede on his day off. However, his day off wasn't the entire 24 hour period for Saturday. Because Mr. Regan was a night driver, he had been told he would not get the entire calendar day of Saturday scheduled off.

He had finished his investigations by the weekend of March 23rd. After making his discharge decision and discussing the case with Mr. Sheridan, Mr. Hansen saw no need to wait to see if Mr. Regan would submit an appeal to the suspension letter.

During the termination phone call, Mr. Hansen told Mr. Regan there would be no appeal. He meant no appeal of his discharge decision.

Between March 15th and the date of the termination, March 25, 2002, Mr. Regan worked for the Company without any problems.

RX 10 to RX 15 represent warning and discipline letters to other drivers about hours of service violations. There are many more, but Mr. Hansen does not know how many. These violations are treated with progressive discipline. Some of the drivers were actually disciplined. None have been fired for this problem.

DOT requires the Company to maintain hours of service documentation and file copies of any cited violations and corresponding disciplinary action. He is not aware of the Company reporting the hours of service violations to DOT.

Generally, the Company's routes are designed to be accomplished within the allowed time. If a driver can not complete the route within time, he calls the dispatcher for instructions. The drivers are foremost responsible for compliance to the hours of service limitations. If a driver can't complete

the route, he shuts down.

Mr. Hansen briefly saw CX 4. He believes Mr. Grennan contacted Mr. Regan about an appeal and instructed to provide substance. Nothing was received from Mr. Regan. Mr. Hansen does not recall Mr. Regan talking to him about an appeal.

Mr. Hansen received a copy of CX 3 in the mail and the e-mail copy, which arrived at 4:00 p.m. on the 26th. Having read the letter, he is not sure what Mr. Regan meant about not being able to find Torpedo Wire or his stress with the recurring situation. There was not a recurring situation with hours of service with Mr. Regan. Mr. Hansen doesn't believe the write-ups Mr. Regan received for his hours violations is the recurring situation Mr. Regan mentioned in his letter.

[ALJ examination] Mr. Hansen talks to the Company's Human Resource specialists. Although refusal to drive was one of the stated reasons for discharge, Mr. Hansen acknowledged that Mr. Regan, after a lengthy conversation, had agreed to drive. His investigation into this matter was whether Mr. Regan had been correct in stating he didn't have enough hours to drive. He also wanted to see who had been subsequently assigned to make the delivery and determine the time of the run. After getting Mr. Regan's agreement to drive, Mr. Hansen believed he had resolved the issue until he called Mr. Parrish back.

Concerning the missed delivery to Sphinx, Mr. Hansen's investigation produced some paperwork indicating the need for the emergency delivery.

When he discussed the suspension letter with Human Resources Department, Mr. Hansen did not mention the refusal to drive or missed delivery events because "it was too early to say that." He understood from Mr. Parrish that Mr. Regan's forgetfulness was associated with the missed delivery.

Based on his personal choice, Mr. Hansen called Mr. Regan with the termination notice rather than place it in writing. RX 16 is an example of a termination with comments. Mr. Hansen does not know where the document concerning Mr. Regan's termination is located.

The progressive discipline Mr. Regan received was a three day suspension and then the termination for the other two incidents. The purpose of progressive discipline is to rehabilitate an employee. Mr. Hansen handles one incident at a time on its own merit. If several incidents "happen to fall in sequence" then management may decide to exercise its right to discharge the employee.

Mr. Hansen called Mr. Regan on the 26th at 3:00 p.m. He did not receive a copy of the e-mail from Mr. Regan, which came in about 4:00 p.m. that day until the next morning.

[Redirect Examination] The copy date on the e-mail, RX 16, is March 27th which is consistent with his recollection that he received it the next day.

Mr. Regan never complained to National Welders Supply that he was being forced to falsify

his hours log. To his knowledge, Mr. Regan did not make any such complaint to DOT or any other agency. No National Welders Supply driver has made such a complaint.

RX 1 - National Welders Supply Employee Handbook

On page 6, the handbook indicates all employees must comply with all regulations applicable to the Company's operations.

According to the handbook, page 43, depending on the seriousness of the infraction, the Company takes a three step disciplinary approach. The first offense generates a documented verbal warning. The second offense may produce a written warning and/or suspension or discharge. For a third offense, the Company may discharge an employee. The handbook also emphasizes that some infractions may be severe enough to warrant discharge as an initial response, by-passing the first two steps.

Page 44 lists about ten representative, "but not all inclusive," situations which are "severe enough to warrant discharge, up to and including discharge upon the first offense." The infractions include intentional falsification of company records, theft, substance abuse, and insubordinate refusal to perform assigned duties and responsibilities.

The handbook, page 44, also provides examples of infractions, again not all inclusive, that may warrant the Company's three step discipline approach. Some of the noted offenses include disrespect to customers, inappropriate verbal behavior, violation of safety rules, and "poor performance of duties or mishandling or [sic] normal responsibilities causing hardship on the Company or other employees."

On August 13, 2001, Mr. Regan acknowledged his receipt of the handbook, agreed to read the contents, and abide by its rules, regulations, policies, and procedures.

RX 2 - January 16, 2002 Warning Letter

Mr. Regan received a warning letter from Mr. Grennan on January 16, 2002 for exceeding his available hours on December 5, 2001, by 0.25 hours.⁶ The letter indicates Mr. Regan had a right to appeal the determination within 15 days. A copy of the letter was forwarded to Mr. Hansen.

RX 3 - February 20, 2002 Hours Violation Letter

On February 20, 2002, Mr. Grennan informed Mr. Regan that he had exceeded the hours limit

⁶The excess time is consistent with entries for the first five days of December 2001 made by Mr. Regan. See CX 6.

on three occasions in January 2002.⁷ For the violations, Mr. Grennan assessed five points against the Safe Driving Bonus System. Mr. Regan has a right to appeal in writing within 15 days. Mr. Hansen is sent a copy of the letter.

RX 4 - March 7, 2002 Hours Violation Letter

Once again, on March 7, 2002, Mr. Grennan assessed five points against Mr. Regan for four separate hours violations in February 2002.⁸ He has 15 days to appeal and Mr. Hansen receives a copy.

RX 5 - Copies of Mr. Regan's Driving Log Entries (Various dates between September 1, 2001 and March 16, 2002)

According to his log entries, on March 13, 2002, Mr. Regan started work in Chester, Virginia, at 4:30 p.m., on duty/not driving. For the next two hours, he reported being engaged in pre-trip activities, departing Chester at 6:30 p.m. Mr. Regan drove to Garysburg, North Carolina and arrived at 7:45 p.m. Between 7:45 p.m. and 9:15 p.m., Mr. Regan was on duty/not driving. At 9:15 p.m., Mr. Regan departed Garysburg and traveled to Rocky Mount, North Carolina, arriving at 10:30 p.m. From that time until midnight, Mr. Regan was on duty/not driving. Including a time from a trip completed on the early morning of March 13th, Mr. Regan drove a total of 3.25 hours that day.

Starting at midnight March 14, 2002, Mr. Regan drove from Rocky Mount to Chester, returning at 1:30 a.m. For the next hour and a half, Mr. Regan was on duty/not driving engaged in post trip activities. At 3:00 a.m., Mr. Regan went off duty.

After 15 hours off duty, Mr. Regan returned to duty at 6:00 p.m. on March 14th. After an hour and a half of pre-trip work on duty/not driving time, Mr. Regan left at 7:30 p.m. and drove 15 minutes from Chester to Richmond, Virginia. Between 7:45 p.m. and 9:15 p.m., Mr. Regan was on duty/not driving. At 9:15 p.m., Mr. Regan returned to Chester in 15 minutes. After his arrival, Mr. Regan spent another hour on duty/not driving. Then, he left Chester at 10:30 p.m. for Durham, North Carolina and was still driving at midnight.

On March 15, 2002, Mr. Regan completed his trip to Durham at 1:00 a.m. In Durham, Mr. Regan remained on duty/not driving from 1:00 a.m. to 4:00 a.m. He resumed driving at 4:00 a.m. and reached Chester, VA at 6:30 a.m. where he recorded post-trip activities on duty/not driving time until 7:15 a.m. For the rest of March 15 and March 16, 2002, Mr. Regan was off duty.

RX 6 - E-mail Copy of Mr. Regan's March 26, 2002 Appeal Letter

⁷The noted violations are consistent with Mr. Regan's log book entries. *See* CX 7.

⁸Although the specific amount of time in excess of the 70 hour limit differs from Mr. Grennan's calculations, Mr. Regan's log book does reflect an excess of 70 hours limit on each of the four days cited by Mr. Grennan. *See* CX 8.

On March 25, 2002, at 4:08 p.m., Ms. Pat Stinson forwarded an e-mail she received from Mr. Regan which contained his March 26, 2002 appeal letter (*see* CX 3). Mr. Regan had sent the e-mail at 5:05 p.m. on March 25, 2002. A date of “3/27/02” appears at the bottom of the page.

RX 7 - Mr. Grennan Letter

A letter signed by Mr. Grennan to an unnamed driver indicates that for the period November 1, 2002 to November 1, 2002, the driver is relieved of duty and responsibility for a vehicle, provided it is safely and legally parked for the purposes of meal stops, equipment breakdown, and loading and unloading when the assistance of the driver is not required. Such relief is not to be less than 15 minutes and the relief for the meal break must be no less than 30 minutes nor more than 60 minutes.

RX 8 - Portions of DOT Federal Motor Carrier Safety Regulations, 49 C.F.R. § 395

Section 395.2 defines “on duty” as all time from the time the driver begins to work or is required to be in readiness to work until the driver is relieved from work and all responsibilities for performing work.

Section 395.3 establishes the maximum driving times as follows:

a) no motor carrier shall permit or require any driver used by it to drive nor shall any driver drive

- 1) more than 10 hours following 8 consecutive hours off duty
- 2) for any period after having been on duty 15 hours following 8 consecutive hours off duty.

b) no motor carrier shall permit or require any driver used by it to drive nor shall any driver drive . . .

- 2) for any period having been on duty 70 hours in any period of 8 consecutive days. . .

Finally, Section 395.8 (a) requires that a commercial driver log his time in four classifications consisting of off duty, sleeper berth, driving, and on duty/not driving

RX 9 - Mr. Regan’s Driving Schedule

This document sets out over a two week period, Mr. Regan’s typical delivery schedule. On Thursday of each week, Mr. Regan is scheduled to make a delivery to Sphinx Pharmaceutical, as one of six stops in the Durham, North Carolina area that day.

RX 10 to RX 14 - Drivers’ Hours of Service Violations

Five drivers received warning letters and 5 point assessments from National Welders Supply for exceeding the hours of service limitations in January and February 2002.

RX 15 and RX 16 - Termination Documentation

In 1999 and 2000, two drivers were discharged for refusing a dispatch.

RX 17 and RX 18 - Disciplinary Letters

In February and March 2002, two drivers received disciplinary letters assessing points against the drivers incentive program for altering the order of their dispatches without providing notice of the change. One driver was also cited for failure to notify the dispatcher of a change in his status and received a one week suspension in addition to the points assessment.

RX 19 - Driver Incentive Program

National Welders Supply will pay its drivers a \$50 bonus each calendar quarter, plus a \$200 annual bonus provided the driver does not acquire more than 15 points in a quarter and 15 points in a year. Under the program, 3 to 15 points may be charged for refusing an assignment without a reasonable excuse when the driver has available hours. Failure to report missing a scheduled delivery results in a 3 point penalty. A driver receives 5 points for driving, or being on duty, over hours. And, 3 to 15 points may be imposed for conduct not in the best interest of the Company.

The program also indicates that for a few of a driver's failures, the second and third offenses result in increased point assessments and termination, respectively. These infractions include falsifying logs, transporting unauthorized passengers, failure to wear a seat belt, and speeding.

RX 20 - Mr. Regan's Employment Application

On his June 14, 2001 employment application, Mr. Regan indicated that he had been employed as a truck driver since 1993.

RX 21 - Memorandum

This undated, unsigned memorandum sets out the sequence of events concerning Mr. Regan's route on March 13 and 14, 2002. At 2:30 p.m., a driver left a fully loaded trailer and a truck without any noted problems for the next dispatch. At 2:45 p.m., Mr. Regan called in for his dispatch and was told to go to Cree Research, MGI, Torpedo Wire (Rocky Mount), Sanfilpo (Garysburg), and then return home. He was also given the telephone number for directions to MGI. At 6:15 p.m., Mr. Regan called Mr. Parrish seeking directions to Torpedo Wire. At 11:32 p.m., Mr. Regan called Mr. Parrish again. Mr. Regan indicated that after his deliveries to Torpedo Wire and Sanfilpo, his trailer was empty. Having been on duty for eight hours, Mr. Regan did not believe he could travel to MGI and then deliver product to Cree Research in the remaining available time. That conversation indicated that Mr. Regan had reversed the order of delivery. Since the necessary quality of product was not available at MGI at that time, Mr. Parrish called in another driver to make the delivery to Cree Research. Mr. Regan was instructed to return home. When the replacement driver arrived at Cree Research, one tank was empty and the second tank was "near alarm level."

RX 22 - Driver's Log

These two pages from the log of the driver who had to make the emergency delivery to Cree Research on March 14, 2003 establishes that he arrived at work at 3:00 a.m on March 14 th and drove product to Durham, NC.

RX 23 - Drivers' Schedule

This document indicates the various drivers' assignments, including the emergency dispatch to Cree Research on March 14, 2002.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In his complaint, Mr. Regan is alleging retaliatory discrimination in the nature of both a suspension and eventual termination based on his claimed protected activities of complaining about being unable to complete assigned routes within the DOT hours of driving limitations and being repeatedly pressured to exceed the driving limitations. As a first step in the adjudication process, I will make specific factual findings. Within brackets ([[-]]) in the following specific findings, I will discuss in detail my assessment of any significant testimonial conflicts. Following my determinations of fact in this case, I will then set out the adjudication principles and apply them to the established facts.

Specific Findings

August 2001 Having worked as a commercial truck driver for several years, Mr. Regan joins National Welders Supply to work as a driver transporting industrial gases to various locations in a multi-state region with his home station being Chester, Virginia. As compensation, Mr. Regan receives both driving pay based on mileage and an hourly wage of \$14.60 for on duty/not driving time. (Mr. Regan's testimony and RX 20).

National Welders Supply produces at two plants, and distributes, nitrogen, oxygen and argon to nearly 1,300 customers in a five state region. Its operations run seven days a week, all year long. The Company uses about 45 drivers on two shifts, day and slip seat (night), to deliver its products. (Testimony of Mr. Parrish and Mr. Hansen)

National Welders Supply has an incentive program for its drivers that provides two monetary bonuses to drivers who successfully comply with company policies and Federal regulations. If a driver accumulates no more than 15 penalty points in a three month period, a \$50 bonus is paid to the driver. Additionally, if a driver also acquires no more than 15 points over the course of a year, he or she will receive an additional \$200. (RX 19)

As a commercial truck driver for National Welders Supply, Mr. Regan is required to comply with the DOT regulations concerning the safe operation of his vehicle. Under these regulations, 49 C.F.R. §395, Mr. Regan must record his status for each day and the time of, and the location where,

his status changes. The four status categories are off duty, sleeper berth, driving, and on duty/not driving. His logs are used to establish compliance with the various driving limitations established by the DOT regulations. (Testimony of Mr. Regan, Mr. Parrish, and Mr. Hansen, RX 5 and RX 8)

Under the DOT regulations, Mr. Regan may be on duty up to 15 hours in a day following 8 consecutive hours off duty. That on duty time may be a combination of driving and on duty/not driving work. However, the driving portion may not total more than 10 hours. Additionally, over the course of 8 days, Mr. Regan may not be on duty more than 70 hours total. (Testimony of Mr. Regan, Mr. Parrish, Mr. Hansen, and RX 8)

Fall 2001 After working a few months as a relief driver, Mr. Regan obtains a regularly scheduled route of deliveries as a night driver. On his work days, Mr. Regan usually calls in between 3:00 p.m. to 4:00 p.m. for his regularly scheduled route plus any additional deliveries. As a night driver, Mr. Regan usually begins his route in the late afternoon or early evening and completes his workday in the early morning hours the next day. His days off are Saturday and Sunday. (Testimony of Mr. Regan, Mr. Parrish and Mr. Hansen, and RX 9)

[[Mr. Regan asserts that on an unspecified Sunday, Mr. Parrish asked him to “top line” while driving locally to vent gas. Since the top line in the driver’s log is “off duty,” making that entry while actually driving would be a false entry. Mr. Regan states he refused the request.

Mr. Parrish denied ever asking a driver to falsify his hours of service log.

In light of this testimonial standoff, I first note that the demeanor of both Mr. Regan and Mr. Parrish was credible. They presented straight- forward answers to both direct and cross-examination questions without equivocation. Likewise, little internal contradiction existed within their answers.

Consequently, I turn to other considerations and eventually conclude Mr. Regan’s testimony about this incident, standing against Mr. Parrish’s denial, is not sufficiently probative to establish Mr. Parrish asked him to falsify his driver’s log while driving to vent gas.

My determination on this factual dispute is first partially influenced by two other aspects of their testimony. Notably, Mr. Regan was unable to recall an important detail about this event - exactly when Mr. Parrish made the request. In contrast, Mr. Parrish’s denial was adamant.

More importantly, I find National Welders Supply’s business practices and its economic environment supports Mr. Parrish’s representation that he does not ask drivers to falsify their records. Granted, with a large customer base located in an extensive multi-state area and only two production plants, the company is obviously exposed to persistent pressure with its cadre of 45 drivers to ensure that none of its customers run out of product. Surely, one of the complicating factors in successfully meeting the demand for its product must be the hours of service limitations associated with the Company’s distribution system. However, both in its handbook, RX 6, and its Drivers’ Safety Bonus Program, RX 19, National Welders Supply repeatedly emphasizes the importance of not falsifying

company records. When first introduced to the Company through its handbook, a new driver is advised that falsifying a company record is a termination offense. Likewise, under the driver's incentive program, the second and third incidents of falsifying a driver's log leads to an increased points penalty and termination, respectively.

Additionally, as required by DOT, and established by the multiple warning and hours violation letters to Mr. Regan and other drivers, RX 2 to RX 4 and RX 10 to RX 14, and Mr. Regan's driving log entries, RX 5, National Welders Supply actively audits its drivers' log entries. Such close company scrutiny emphasizes the both the importance of compliance with DOT hours of service limitations and the need for accurate record keeping.

Further, as Mr. Hansen testified, National Welders Supply's compliance with Federal regulations is both audited by DOT and essential for the company's viability. Nothing in the record contradicts Mr. Hansen's statement that without exception, annually, the Company has received that requisite rating of satisfactory for its compliance with the DOT regulations. According to Mr. Hansen, without that satisfactory finding by DOT, National Welders Supply would go out of business. Thus, in addition to the clear safety benefits related to the driving regulations, countering any economic stress imposed by the DOT regulatory limitations is the business jeopardy of receiving less than a satisfactory rating from DOT. In such a business environment, considering the Company's written policies on record falsification, its audit of drivers' logs, and established compliance record with DOT regulations, the likelihood that a National Welder Supply dispatcher, in this case, Mr. Parrish, would ask a driver to falsify his log seems improbable.]]

About November 24, 2001 [[Mr. Regan asserts on this particular day, he had only six hours of duty time available. Mr. Parrish asked him to top line, or report being off duty, in order that he could preserve his remaining on duty time to ensure a scheduled delivery could be made. Again, Mr. Parrish states he has not asked any driver to falsify his driver record.

Upon close consideration of this exchange, I do not really see a conflict. As set out in RX 7 and described by Mr. Hansen, National Welders Supply has a policy of having its drivers record "relieved of duty" time as off duty time for periods of time when they are not responsible for their vehicles or performing work for the Company. An example is an hour meal break. Thus, asking a driver to make a top line entry, standing alone, does not necessarily equate to asking the driver to falsify the record. Instead, it can represent a request for the driver to go into "relieved of duty" status, for which he gets paid, but which does not count against the on duty time limit.]]

Mr. Parrish asks Mr. Regan to "top line" to preserve his remaining on duty time in order that a delivery can be made. Mr. Regan declines. Mr. Parrish is not upset and replies, "That's fine."

December 2001. On one day, Mr. Regan exceeds his hours of service limit by a quarter hour. He subsequently receives a warning letter, dated January 16, 2002 , from Mr. Grennan (Testimony of Mr. Regan and RX 2)

January 2002 During this month, at a drivers' meeting in Charlotte, North Carolina, Mr. Parrish asks Mr. Regan to drive back to the Company after the conference. Mr. Regan tells him that

he is out of hours and Mr. Parrish says nothing further. Later, Mr. Regan explains his situation to Mr. Grennan who tells him to lay over. Mr. Regan does lay over for eight hours. However, after that period, when he drives as requested, Mr. Regan still exceeds the 70 hours on duty cumulative limit.

On at least two occasions this month, Mr. Regan exceeds his hours of service limitations and later on February 20, 2002, receives a 5 point penalty assessment from Mr. Grennan for three violations. Mr. Regan disagrees with the third violation based on a recalculation of his time and the fact that he actually stopped driving during that trip until midnight when he picked up additional driving time in which to complete the route. (Testimony of Mr. Regan, CX 4 and RX 3)

February 2002 Mr. Regan exceeds the hours limitations four times this month and receives another 5 point penalty on March 7, 2002. (Testimony of Mr. Regan and RX 4)

About March 4, 2002 Mr. Hansen has a discussion with Mr. Regan about scheduling work. He agrees with Mr. Regan that usually Mr. Regan will not be scheduled to work on his days off, Saturday and Sunday. (Testimony of Mr. Regan and Mr. Hansen)

Wednesday, March 13, 2002 When Mr. Regan receives his dispatch in the afternoon, Mr. Parrish tells him to go to Cree Research, reload at MG Industries ("MGI") and continue to Sanfilpo and Torpedo Wire. Two of the stops, MGI and Torpedo Wire were new to Mr. Regan. Mr. Regan's assigned truck is already filled with product (nitrogen). At 4:30 p.m., Mr. Regan comes on duty/not driving and for the next two hours he engages in pre-trip activities which include an attempt to obtain directions to MGI and Torpedo Wire. Considering the instructions to Torpedo Wire were vague, Mr. Regan calls Mr. Parrish to ask for additional information. Due to his continued uncertainty about the location of the two new locations, Mr. Regan decides to attempt delivery first to Torpedo Wire. He departs Chester, Virginia, at 6:30 p.m. Still needing better directions, Mr. Regan obtains help from his wife who provides directions to Torpedo Wire that she obtained from the internet. (Testimony of Mr. Regan, Mr. Parrish, and Mr. Hansen, and RX 5)

At 7:45 p.m., Mr. Regan arrives at Sanfilpo and delivers product, on duty/not driving, from arrival to 9:15 p.m. He then proceeds to Torpedo Wire and arrives at 10:30 p.m. For the next hour and a half, during the product off load, Mr. Regan is on duty/not driving. Having emptied his trailer and reviewed his log, Mr. Regan concludes he has insufficient time remaining due to the 70 hour limit to go to MGI to obtain more product and then proceed to Cree Research for the delivery. Consequently, Mr. Regan calls Mr. Parrish about 11:30 p.m. and informs him about the problem. At that time, Mr. Parrish becomes upset because Mr. Regan did not drive the dispatch in the sequence Mr. Parrish gave him. For this dispatch, the order of delivery was important because only the nitrogen in the trailer at the start of Mr. Regan's day was qualified for delivery to Cree Research. MGI could not supply that qualified nitrogen for Cree Research in the evening. At the time he drove the route, Mr. Regan was not aware of this limitation. Because the qualified product was not available at MGI, Mr. Parrish directed Mr. Regan to return to Chester. (Testimony of Mr. Regan and Mr. Parrish, and RX 5)

Thursday, March 14, 2003 From midnight to 1:30 a.m., Mr. Regan drives back to Chester.

After completing post-trip work, Mr. Regan goes off duty at 3:00 a.m. (RX 5)

In the meantime, Mr. Parrish arranges for another driver to pick up a trailer of qualified nitrogen at the Company's plant in Virginia and deliver it to Cree Research, the Company's second largest customer. When the driver makes the delivery, Cree Research has almost depleted its supply of nitrogen. (Testimony of Mr. Parrish, and Mr. Hansen, RX 5, and RX 23)

Later in the morning, Mr. Hansen learns of the revised routing by Mr. Regan and Mr. Parrish's efforts to make the delivery to Cree Research with another driver. (Mr. Parrish)

At 6:00 p.m., Mr. Regan comes on duty, makes a couple of short, local trips, and then drives to Durham, North Carolina. (RX 5)

Friday, March 15, 2002 At the start of this day, Mr. Regan is still driving to Durham, North Carolina. Between his arrival in Durham at 1:00 a.m. and 4:00 a.m., Mr. Regan is on duty/not driving. He finds himself stuck at company security area waiting for a security guard to release him. This delay causes him to run out of time. As a result, Mr. Regan is not able to make two other deliveries. He returns to Chester at 6:30 a.m. and goes off duty at 7:15 a.m. (Mr. Regan and RX 5)

[[Mr. Regan asserts that upon his return to Chester the morning of March 15th, he left Mr. Parrish a voice message stating that he had run out of time for the day, Friday, March 15, 2002 and was unable to complete two deliveries.

Mr. Parrish maintains he never received such a voice message. Additionally, according to Mr. Parrish, concerning the missed deliveries, Mr. Regan first told him that he forgot to tell Mr. Parrish about them. Later, he informed Mr. Parrish that he had placed the information about the two non-deliveries on Mr. Parrish's voice mail.

As previously stated, both Mr. Regan and Mr. Parrish testified with credible demeanor. At the same time, I have already resolved one factual dispute against Mr. Regan, despite his hearing demeanor and accepted Mr. Parrish's testimony. In resolving the next factual dispute between Mr. Regan and Mr. Parrish, I once turn to other evidence in the record to determine this time that both Mr. Regan and Mr. Parrish are partially correct.

First, Mr. Regan's behavior after the morning of the March 15th, does support his claim to have reported his lack of duty hours for the rest of the day on Mr. Parrish's voice mail. As a slip seat driver, with a Monday to Friday work schedule, Mr. Regan was obligated on Friday afternoon to call Mr. Parrish for his dispatch. The absence of his usual phone call to Mr. Parrish on Friday afternoon for a dispatch assignment is consistent with a belief by Mr. Regan that Mr. Parrish would already know due to his earlier voice mail message that he was out of hours for the rest of Friday.

Second, in an ironic, similar manner, Mr. Parrish's Friday afternoon telephone call to Mr. Regan supports Mr. Parrish's claim that he never received Mr. Regan's Friday morning voice mail message. Since, as both Mr. Regan and Mr. Parrish testified, the purpose of the call was to assign

Mr. Regan a dispatch, Mr. Parrish's phone call reflects his lack of knowledge that Mr. Regan had no more duty hours for Friday. Both Mr. Regan and Mr. Parrish also confirm that in their discussion, Mr. Parrish stated he had not received Mr. Regan's earlier message.

Consequently, due to the actions of Mr. Regan and Mr. Parrish on the afternoon of March 15th and the contents of their telephone exchange, I conclude Mr. Regan did leave a voice mail message for Mr. Parrish that he was out of duty hours for the rest of the day. I also find Mr. Parrish did not get that message.⁹]]

At 7:00 a.m, Mr. Regan leaves a voice message for Mr. Parrish telling him that he ran out of duty hours for March 15th. Mr. Parrish never receives that voice message. Later in the day, a customer calls Mr. Parrish indicating that he has not received product which Mr. Regan had been scheduled to deliver. Mr. Parrish was unaware that Mr. Regan had missed any deliveries. (Testimony of Mr. Regan and Mr. Parrish)

In the afternoon, when Mr. Regan doesn't call in for his Friday dispatch, Mr. Parrish calls him to do a short run to Newport News. Mr. Regan refuses because he has no available duty hours for Friday. Mr. Parrish then determines that Mr. Regan will pick up additional hours at midnight and would be able to start the short run then. He explains the importance of the delivery. Because the driving assignment does not actually start on Friday, Mr. Regan views the request as a demand to drive on his day off. Mr. Regan refuses to drive. Mr. Parrish informs him that his refusal will be considered a refusal to accept a dispatch. Mr. Regan still declines to drive. (Testimony of Mr. Regan and Mr. Parrish and CX 2)

Due to Mr. Regan's refusal, Mr. Parrish obtains another driver to make the delivery to a hospital in Newport News. Later, he receives a call from Mr. Hansen who states Mr. Regan has agreed to drive the dispatch. (Testimony of Mr. Parrish and Mr. Hansen).

After talking to Mr. Parrish, Mr. Regan calls Ms. Stinson about Mr. Parrish's request. Ms. Stinson in turn calls Mr. Hansen who contacts both Mr. Parrish and Mr. Regan. Mr. Parrish tells Mr. Hansen that Mr. Regan has refused a short dispatch starting at midnight when he would acquire sufficient hours to make the trip. Mr. Regan tells Mr. Hansen that the dispatch is occurring on his day off. Mr. Hansen explains to Mr. Regan that although the dispatch doesn't start on Friday, it is short enough that he will complete the route without appreciably changing his usual completion time on Saturday. After Mr. Hansen adds that his declination will be considered a refusal to accept a

⁹Based on the both the contents of Mr. Parrish's direct testimony and Mr. Regan's rebuttal testimony, I am less convinced that Mr. Regan also included specific information about the two missed deliveries in that same voice mail message. According to Mr. Parrish, Mr. Regan initially stated that he had forgotten to tell Mr. Parrish about the missed deliveries. In his rebuttal testimony, expressing his belief that he had included the missed delivery information in the telephone message, Mr. Regan did not specifically deny that he had at one time told Mr. Parrish he had forgotten to pass on that information. Ultimately, however, the issue of whether Mr. Regan also included specific information about the missed deliveries in his voice mail to Mr. Parrish is overcome by my determination that Mr. Parrish never received the voice message, regardless of the message's content.

dispatch, Mr. Regan agrees to take the assignment. Mr. Hansen than calls Mr. Parrish but is informed that another driver is taking the dispatch. Mr. Hansen calls Mr. Regan and tells him that someone else took the delivery. (Testimony of Mr. Regan and Mr. Hansen, and CX 2)

Monday, March 18, 2002 Mr. Parrish tells Mr. Hansen that Mr. Regan missed a delivery on March 14/15. (Testimony of Mr. Hansen and Mr. Parrish)

Tuesday, March 19, 2002 Mr. Hansen writes a memo about his exchange with Mr. Regan on Friday, March 15, 2002. (Testimony of Mr. Hansen and CX 2)

March 18 to March 22, 2002. During this week, Mr. Hansen gathers information about all three recent incidents involving Mr. Regan. He obtains and reviews schedules and log dates relating to the period March 13 to March 15, 2002. (Testimony of Mr. Hansen)

Thursday, March 21, 2002 Mr. Hansen sends a disciplinary letter to Mr. Regan, suspending him for three days, effective Monday, March 25, 2002, and assessing 10 penalty points due his altering the delivery sequence on March 13 and 14, 2002. He considers Mr. Regan's unilateral reverse of the delivery order, and failure to inform the dispatcher of the change, conduct that was not in the best interests of the Company. Mr. Hansen states additional inappropriate actions may lead to termination. He gives Mr. Regan 15 days from receipt to appeal the action. (Testimony of Mr. Hansen and Mr. Regan, and CX 1)

Monday, March 25, 2002 [[Although Mr. Regan testified that he wrote and sent the letter on March 26, 2002, the transmission date of his e-mail copy of the letter is dated March 25, 2002 at 4:08 p.m. (RX 6). As a result, I find, Mr. Regan actually wrote the letter on March 25th and certainly sent an e-mail copy on that date.(RX 6)]]

Mr. Regan writes and sends via e-mail an appeal letter. He explains that he was unaware the order of delivery on March 13 and 14, 2002 was important. As result, he altered the routing to go to the unfamiliar locations first in order to complete as much of the dispatch as possible. Mr. Regan states he was concerned the time consumed in finding Torpedo Wire would affect his hours of service. Distressed with this recurring situation, Mr. Regan obtained help from his wife for directions. Mr. Regan requests compensation for the three days of suspension and removal of the assessed points. (Testimony of Mr. Regan, CX 3 and RX 6).

[[At this point, I reach a significant testimonial conflict between Mr. Regan and Mr. Hansen. Specifically, Mr. Regan testified that on March 28,2002, after the completion of the three day suspension period of March 25 to March 27, 2002, he called Mr. Parrish for a dispatch. Mr. Parrish put him on hold and then Mr. Hansen and Ms Stinson came on the line. At that time, Mr. Hansen fired him for being uncooperative. After indicating that he had read Mr. Regan's appeal of the suspension, Mr. Hansen stated there would be no appeal to either the suspension or termination.

Mr. Hansen recounts a different version of this telephone conversation. According to Mr. Hansen, he called Mr. Regan on March 26, 2002, prior to expiration of the suspension period, and terminated his employment. The phone call, with Ms. Stinson on the conference line, occurred before

he had read the e-mail or letter containing Mr. Regan's appeal of the suspension.

As I stated before, Mr. Regan's testimony was generally credible. At the same time, as discussed, portions of his presentation have not been supported by other evidence in the record. In a similar manner, Mr. Hansen presented generally credible and confident testimony. Yet, other aspects of his testimony, in particular, his explanation for discharging Mr. Regan undermine my certainty about his presentation.

Mr. Hansen stated he decided to terminate Mr. Regan's employment due to three "severe" infractions. The second of those severe infractions was Mr. Regan's reluctance to accept a dispatch on Friday evening, March 15, 2002. Placing that offense into perspective, and while acknowledging that management does not necessarily have to take a stepped approach to discipline, I first note that as policy and guidance, the Company's handbook indicates refusal to perform a duty appears to be a dischargable first time offense only if it is insubordinate. Correspondingly, in the Company's drivers' incentive program, unlike other offenses which list termination as a penalty, refusal of a dispatch only warrants a 3 to 15 points penalty. Secondly, in reality, the March 15th incident hardly seems "severe" or insubordinate because Mr. Regan actually accepted the dispatch after his discussion with Mr. Hansen. In fact, upon Mr. Regan's acceptance of the dispatch and his apparent decision not to discuss the issue any further, Mr. Hansen believed at the time that the problem had been resolved (*See CX 2*).

The third "severe" incident that Mr. Hansen presented to justify Mr. Regan's discharge was his failure to notify Mr. Parrish of the missed delivery. In evaluating the severity of that offense, I simply observe that the Company's drivers incentive program, which contains sanctions ranging from 2 to 15 penalty points to termination, penalizes a driver who fails to inform a supervisor of a missed scheduled delivery only "3 Points" under Group III, No. 4.

Also troubling is Mr. Hansen's stated decision making process in terminating Mr. Regan. Mr. Hansen acknowledged that the purpose of the suspension letter is corrective in nature. Based on that representation, on March 21, 2002, when he sent the suspension letter, Mr. Hansen appears to have intended to rehabilitate Mr. Regan and keep him as a driver for National Welders Supply. However, according to Mr. Hansen, based on further investigation, he subsequently changed his mind and decided to terminate Mr. Regan due to the three successive "severe"¹⁰ infractions.

That explanation seems implausible considering the facts in this case. Over the course of two days, between March 13th and March 15th, 2002, Mr. Regan altered a delivery route without informing the dispatcher, missed two deliveries, and initially declined an assignment from the dispatcher. When Mr. Hansen composed and sent his March 21, 2002 suspension letter to Mr. Regan for the altered delivery route in an apparent effort to rehabilitate him, he already knew about all three "severe" infractions. Although the subsequent investigation may have provided confirmation of what Mr. Hansen knew personally, or from Mr. Parrish, about the second and third incidents, the need for

¹⁰See two paragraphs above.

further investigation of the later two events seems a weak explanation for why Mr. Hansen did not cite Mr. Regan for all three offenses in his March 21st correspondence or why Mr. Hansen did not defer any disciplinary action until his investigation of all three incidents, which occurred in a two day time span, was completed. Further, the subsequent investigation, which essentially confirmed what Mr. Hansen already knew about the other two “severe” infractions, hardly seems to be the critical factor that moved Mr. Hansen from suspension of Mr. Regan for three days to discharge.

This testimonial face off might have been resolved by two other individuals who were aware of the circumstances about the termination phone call, Mr. Parrish and Ms. Stinson. Unfortunately, neither party, nor I for that matter, asked Mr. Parrish whether, as claimed by Mr. Regan, Mr. Regan called him at the end of the suspension period and Mr. Parrish placed him on hold so that Mr. Hansen could tell Mr. Regan he was discharged. Likewise, neither party called Ms. Stinson, the Company’s human resources specialist, who both Mr. Hansen and Mr. Regan claimed was also a party to the telephone conversation when Mr. Regan was terminated.

Perhaps, Mr. Parrish and/or Ms. Stinson know who placed the phone call to whom, what day the termination phone call took place, and whether Mr. Hansen indicated during the phone call that he had read the contents of the appeal letter. Unfortunately, I am unable to determine the answers to those questions. However, as discussed in detail below, based on my review of Mr. Regan’s appeal letter, I really don’t have solve this mystery presented by the two principal participants in the same telephone conversation.]]

Sometime between March 26th and March 28th, in a telephone conversation, Mr. Hansen discharges Mr. Regan for being uncooperative.

Adjudication Principles

The employee protection provisions of the STAA, 49 U.S.C. §31105, prohibits the discriminatory treatment of employees who have engaged in certain activity related to commercial motor vehicle safety. First, under 49 U.S.C. §31105 (a) (1) (A), an employee is protected if he or she has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order. The U.S. Department of Labor (“DOL”) interprets this provision to include internal complaints from an employee to an employer. DOL’s interpretation that the statute includes internal complaints “is eminently reasonable.” *Clean Harbors Environmental Services, Inc. v. Herman* 146 F.3d 12 (1st Cir. June 10, 1998) (case below 95-STA-34). The U.S. Circuit Court of Appeals also stated internal communications, particularly if oral, must be sufficient to give notice that a complaint is being filed and thus that the activity is protected. There is a point at which an employee’s concerns and comments are too generalized and informal to constitute “complaints” that are “filed” with an employer within the meaning of the STAA. *Id.*

An additional two types of employee activity are also protected under the STAA. Title 49 U.S.C. §31105 (a) (1) (B) (i) provides protection for an employee who refuses to operate a vehicle in violation of any Federal rules, regulations, standard, or orders applicable to commercial vehicle safety or health. And, 49 U.S.C. §31105 (a) (1) (B) (ii) protects an employee who refuses to operate

a commercial motor vehicle which he or she reasonably believes would cause serious injury to the employee or the public due to its unsafe condition. The Secretary, through the Administrative Review Board (“ARB”), has determined that if an employee makes an objection regarding an unsafe condition and then actually drives the vehicle, the complaint should be more properly analyzed under the “complaint” provision of 49 U.S.C. § 31105 (a)(1)(A). *Zurenda v. J & K Plumbing & Heating Co., Inc.* 97-STA-16 (ARB, June 12, 1998). In addition, the complainant must prove that an actual violation of a regulation, standard, or order would have occurred if he or she actually operated the vehicle. *Brunner v. Dunn’s Tree Service*, 94 STA 55 (Sec’y Aug. 4, 1995).

In order to invoke the whistle blower provisions of the STAA, a complainant has the burden of proof to establish the respondent took adverse employment action because the complainant engaged in one of the STAA’s protected activities. The analysis for determining whether a complainant meets his or her burden of proof is derived from the long, and continuing, line of Federal employment law discrimination cases.

As set out in exhaustive detail by the U.S. Circuit Court of Appeals for the Eleventh Circuit, in *Wright v. Southland Corp.*, 187 F. 3d 1287 (11th Cir. 1999), a complainant may take two fundamental approaches to establish unlawful discrimination. First, relying on the traditional approach, a complaint may attempt to prove by direct evidence that more likely than not, the employer engaged in unlawful discrimination. *Id.* at 1289. If in response, the employer also provides evidence of legitimate purposes for its actions, then the case becomes a “mixed motive” case and the burden of persuasion shifts to the employer to demonstrate, as an affirmative defense, by a preponderance of the evidence that it would have taken the same action, in the absence of the discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 252 to 255 (1989) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977).

Since directly proving an employer’s intent of illegal discrimination may be difficult, the U.S. Supreme Court developed a second approach that enables a complainant to present a rebuttable presumption of illegal discrimination. *See Wright*, 187 F. 3d at 1290 and *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). The ARB has applied this approach in STAA cases and in *Byrd v. Consolidated Motor Freight*, 97-STA-9 at 4-5 (ARB May 5, 1998), recently summarized the burdens of proof and production in this type of case:

A complainant initially may show that a protected activity likely motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STA-15, Final Dec. and Ord., Apr. 15, 1998, slip op. At 5-6. A complainant meets this burden by proving (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a “causal link” or nexus,” e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec’y of Labor*, 64 F. 3d 261, 277 (7th Cir. 1995). A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the

adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

The ARB in a footnote to the above paragraph provided further explanation on this last phase of the adjudication process:

Although the “pretext” analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant, throughout the proceeding. Once a respondent produces evidence sufficient to rebut the “presumed” retaliation raised by the *prima facie* case, the inference “simply drops out of the picture,” and “the trier of fact proceeds to decide the ultimate question.” *St. Mary's Honor Center*, 509 U.S. at 510-511. See *Carroll v. United States Dep't of Labor*, 78 F. 3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a *prima facie* case becomes irrelevant once the respondent has produced evidence of a legitimate nondiscriminatory reason for the adverse action).

The United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* 120 S. Ct. 2097 (2000), provided further explanation of the pretext phase of the analysis introduced in the *St. Mary Honor Center* case. The court first reiterated that if an employer articulated a non-discriminatory reason for the challenged adverse action, the complainant retains the ultimate burden to show the stated reason is pretext for unlawful discrimination. In meeting that ultimate burden, the complainant may, but not necessarily, prevail based on the combination of a *prima facie* case and sufficient evidence to demonstrate the asserted justification is false. In light of the false justification, the trier of fact may conclude the employer engaged in unlawful discrimination. *Reeves*, 120 S. Ct. at 2108. In other words, there may be an inference that the employer's falsehood is an attempt to cover up the unlawful discrimination.

Finally, concerning witness credibility, all factual findings, including credibility findings must be supported by substantial evidence in the record as a whole. *NLRB v. Cutting, Inc.* 791 F.2d 659, 667 (7th Cir. 1983). At the same time, the Secretary has observed that a lack of evidence to corroborate conflicting testimony on an issue, coupled with an inability to discern the truth through the demeanor of the witnesses, may lead to an inability to find a complainant's version of the facts more credible. In that case, there may be an insufficient basis for finding a *prima facie* case. *Cook v. Kidimula International, Inc.* 95 STA 44 (Sec'y Mar. 12, 1996).

Discussion

*Prima Facie Case*¹¹

The first requisite for Mr. Regan's establishment of a *prima facie* case of illegal discrimination is a showing that he engaged in the protected activities of refusing to drive in violation of DOT regulations or raising a safety complaint related to motor vehicle safety regulations. Based on the nature of Mr. Regan's allegations and the facts of this case, his claimed protected activities fall into two general time periods, Fall 2001 to January 2002, and March 2002.

Fall 2001 to January 2002

During this period, according to Mr. Regan, he was confronted with three situations in which he complained about being pressured to violate the DOT hours of service limitations. The first two incidents involved his refusal to make "top line" entries in his driver's logbook representing off duty status when he would have been driving or on duty/not driving. These incidents fall under the protected activity category of refusing to drive in violation of DOT regulations. To establish this type of protected activity occurred, Mr. Regan must show: a) he was asked to violate the DOT hours of operations regulations; and, b) his acquiescence to the request would have actually caused a violation of the DOT hours of operations regulations.

The first refusal to drive incident was Mr. Regan's refusal of Mr. Parrish's request to "top line" while driving to vent gas. However, since I have decided the evidentiary record is insufficient to establish that Mr. Parrish made such a request, Mr. Regan is not able to show a protected activity in regards to this particular allegation.

The second refusal to drive event is alleged to have occurred about November 24, 2001 when Mr. Parrish asked Mr. Regan to "top line" in order to make a scheduled delivery. From Mr. Regan's perspective, Mr. Parrish's request involved making a false entry in his driver's log book. Upon consideration of the entire record, I conclude Mr. Regan's subjective understanding about Mr. Parrish's request is insufficient because "top line" entries made to preserve on duty hours are not necessarily violations of DOT regulations. Notably, as Mr. Grennan explains in his letter about a driver's status during meal breaks and mechanical breakdowns (RX 7), if a driver has been relieved of responsibility and his duties, that period of time may be considered off duty and recorded on the "top line" of the driver's log. Absent any objective evidence that Mr. Parrish's request was something other than request for Mr. Regan to appropriately go into off duty status, and again in light of Mr. Parrish's denial of asking drivers to falsify their log books, I find Mr. Regan has failed to demonstrate Mr. Parrish's request represented a request to violate DOT regulations. As a result, Mr. Regan's refusal in response to Mr. Parrish's request was not a protected activity.

¹¹I am well aware of the ARB's admonition to administrative law judges that a *prima facie* determination is not warranted in a case fully tried on its merits. *Williams v. Baltimore City Public Schools System*, ARB No. 01-021, ALJ No. 2000-CAA-15, (ARB May 20, 2003) and *Mourfield v. Frederick Plass, Inc.* ARB Nos. 00-055 and 00-056, ALJ No. 1999-CAA-13 (ARB Dec. 6, 2002). However, as also noted by the ARB, such an analysis helps sharpen the issues remaining for decision. *See Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003).

The third incident during this period in which Mr. Regan felt pressure to violate the hours of service limitations occurred in January 2002, after a safety meeting in Charlotte, North Carolina. As recalled by Mr. Regan, this event involved his initial protest to an illegal driving request and then his subsequent compliance which caused him to exceed the DOT limitations on hours of service. As noted above, when a driver acquiesces to an illegal driving request, the situation is considered a complaint rather than a refusal to drive. To establish this type of protected activity, Mr. Regan must demonstrate: a) a request to violate the DOT regulations; b) his protest or objection to the request; and, c) his acquiescence to the request lead to a regulation violation.

Although Mr. Regan's un rebutted testimony establishes his actions lead to a violation of the DOT regulations, the evidence is insufficient, for two separate reasons, to show that he objected to an illegal request in either of his conversations with Mr. Parrish and Mr. Grennan at the safety meeting in January 2002. First, in the conversation with Mr. Parrish, no illegal request was made. In response to Mr. Parrish's request that he drive back to the Company, Mr. Regan declined because he did not have sufficient hours to do so. At that point, Mr. Parrish did nothing further. Consequently, since Mr. Parrish did not renew his request after he became aware Mr. Regan did not have enough hours to accomplish the drive, their exchange did not involve a request to violate the DOT regulations.

Second, in the discussion with Mr. Grennan, Mr. Regan did not make the requisite objection. After speaking with Mr. Parrish, Mr. Regan sought out Mr. Grennan and told him about his situation. Mr. Grennan responded with instructions to lay over for eight hours and then drive back to the Company. Assuming in describing his situation, Mr. Regan told Mr. Grennan that he had reached all three hours of service limitations (10, 15, and 70), Mr. Grennan's instructions may be interpreted as a request to violate the hours of service limitations in the DOT regulations. However, notably absent in his description of the conversation with Mr. Grennan is any indication that Mr. Regan actually objected to Mr. Grennan's instructions to drive after resting for eight hours. Absent such an objection to Mr. Grennan's request, their conversation also fails to satisfy the requirements of a protected activity.

Even if Mr. Regan had been able to establish that any, or all, of the three situations in the fall of 2001 and January 2002 involved activities that were protected under the Act, Mr. Regan's *prima facie* case remains problematic in regards to the requisite element that Mr. Hansen was aware of these specific activities.

The incidents for this period involved two National Welders Supply dispatchers, Mr. Parrish and Mr. Grennan. Certainly, based on their interactions with Mr. Regan, they were both aware of his activities. However, neither Mr. Parrish nor Mr. Grennan exercised supervisory control over Mr. Regan and did not take the two adverse personnel actions against him. The record contains no evidence that Mr. Hansen, the supervisor who actually suspended and then terminated Mr. Regan, was either personally aware of the incidents or had been informed of Mr. Regan's actions by Mr.

Parrish and Mr. Grennan.¹² As a result, absent such knowledge, Mr. Hansen was not motivated by, and did not base any personnel determinations on, Mr. Regan's three purported protected activities in the fall of 2001 and January 2002. See *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 230 (6th Cir. 1987) and *Carroll v. J.B. Hunt Transportation*, 91 STA 17 (Sec'y June 23, 1992).

March 2002

In response to his suspension, Mr. Regan sent an appeal letter to Mr. Hansen on March 26th, 2002. In that letter, Mr. Regan stated he was concerned on March 13th that the lack of directions to Torpedo Wire would adversely affect his driving hours limitation. Additionally, Mr. Regan recalled that he was distressed with this recurring situation. At the hearing, Mr. Regan testified that these references in his letter were complaints about violations of the DOT regulations and thus a protected activities under the Act. Seeing no other apparent cause for his discharge at the expiration of his suspension, Mr. Regan claims Mr. Hansen terminated his employment due to those protected complaints in his suspension appeal letter.

In order for statements, or an alleged complaint, to come under the employee protection umbrella of the Act, it must be reasonably perceived by the complainant, specific, and objectively related to driving safety. The Secretary, U.S. Department of Labor, has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the subject statute. While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. At the same time, the alleged act must implicate safety definitively and specifically. *American Nuclear Resources v. United States Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). The complainant's concern must at least "touch on" the subject matter of the related statute. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994). And, an employee's vague and tenuous statements may be insufficient to be perceived as protected complaints. *White v. Maverick Transportation, Inc.*, 94 STA 11 (Sec'y Feb. 21, 1996). Finally, the evaluation of the complaint involves an objective assessment. The subjective belief of the complaint is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997).

In my findings of fact analysis, I concluded I did not need to resolve the factual conflict of whether Mr. Hansen received Mr. Regan's appeal letter prior to the termination decision. I reached that conclusion because even if Mr. Hansen was incorrect and he actually did receive Mr. Regan's appeal letter prior to discharging him, I find Mr. Regan's comments in the appeal letter were not protected complaints because they were neither specifically nor objectively related to trucking safety or DOT regulation violations.

¹²Considering the scale of National Welders Supply's operations, application of the "small shop doctrine," to support a finding that Mr. Regan's interactions with Mr. Parrish and Mr. Grennan were made known to Mr. Hansen, is not warranted. See *Ertel v. Giroux Brothers Transportation, Inc.*, 88 STA 24 (Sec'y Feb. 16, 1989).

As a slip seat driver for National Welders Supply on a specified route, Mr. Regan usually had a fixed number of deliveries each day. The driving job was demanding and, occasionally, Mr. Regan would exceed the hours of service limitations or even miss a delivery in attempting to complete his route. In this environment, I have no doubt Mr. Regan believed his work required him to push the limits of the driving regulations and that anything out of the ordinary, such as a new delivery location, without specific directions, would cause him concern about being able to complete all his deliveries in time. I also do not doubt the delivery demands and driving limitations constraints were a recurring situation for Mr. Regan.

In his hearing testimony, Mr. Regan explained that in his appeal letter, CX 3, he conveyed his concerns about the stress between the demands of his delivery schedule and the DOT hours of service limitations as follows:

I was really concerned that I would not be able to find Torpedo Wire and the time consumed would effect [sic] my hours of service. On the way to North Carolina, distressed with this recurring situation, I decided to call my wife and she graciously took time to find directions to Torpedo Wire on the internet.

My understanding of what Mr. Regan intended to convey to Mr. Hansen by these comments is greatly aided by his hearing testimony. However, without his supplemental explanation, Mr. Regan's first statement about Torpedo Wire, read objectively, simply relates to Mr. Hansen that on the night of March 13th, Mr. Regan recognized the lack of specific directions to Torpedo Wire could very well result in the consumption of an inordinate amount of on duty and driving time. Significantly, the sentence contains no specific allegation that due to such waste of time, Mr. Regan was being forced to violate the DOT driving regulations. Thus, from an objective perspective, the sentence fails to notify Mr. Hansen that Mr. Regan is presenting a complaint about trucking safety or an hours of service violation.

Considering the second sentence, Mr. Regan also explained at the hearing that the phrase "recurring situation" referenced the constant pressure exerted upon him to exceed the hours of service limitations in order to complete his routes. However, once again, this second sentence does not specifically raise that complaint. The lack of specificity becomes readily apparent when asking the question - what situation is recurring? Even with Mr. Regan's hearing explanation, the phrase at best can be interpreted as a complaint that Mr. Regan is repeatedly being subjected to situations that consume an inordinate amount of duty time and reduce the available amount of his DOT duty time. Yet, that meaning does not state a DOT violation since having a driver operate until he reaches his hours of service limits, even if caused by poor directions, is not a violation of DOT regulations. Mr. Regan does not explain in the letter that the "recurring situation" relates to being pressured to exceed the DOT driving limitations. Without Mr. Regan's additional testimony, and objectively considering the second sentence as a whole including the comment that Mr. Regan had to obtain directional assistance from his wife, the sentence indicates the Company repeatedly fails to provide adequate directions to unfamiliar delivery locations which has the effect of causing distress by wasting a driver's time. Consequently, the second sentence does not place Mr. Hansen on notice that Mr.

Regan is presenting a trucking safety or an hours of service violation complaint.

As a final objective test, when both sentences are considered within the context of his suspension for altering a delivery route and the entire contents of the appeal letter, without any supplemental explanation by Mr. Regan, his comments clearly are not safety complaints or protests about pressure to violate the hours of service regulations. In appealing the three day suspension for changing the order of delivery on March 13th, Mr. Regan explains that he received inadequate driving instructions from the dispatcher, Mr. Parrish. Mr. Regan emphasizes that this lack of specific location information about Torpedo Wire, coupled with his hours of service limitations on that night, were the reasons that he altered the order of the assigned deliveries and eventually ran out of time in compliance with the regulatory limitations. Both as mitigation and extenuation, Mr. Regan also points out that not only is he not to blame for the insufficient directions, but the receipt of such insufficient directions is a recurring problem.

With his supplemental hearing testimony, I can understand Mr. Regan's conviction that his appeal letter comments were protected activities. However, when Mr. Hansen read the letter in March 2002, he did not have the benefit of such testimony. Within its four corners, the letter itself contains no clear indication that Mr. Regan is really objecting to persistent pressure to violate the DOT hours of services limitations. Due to the lack of such a specific complaint, and based on an objective reading of Mr. Regan's March 26, 2002 appeal letter to Mr. Hansen, I conclude his comments do not rise to the level of complaints about trucking safety or DOT regulations violations that would be protected activities under the Act. As a result, I find Mr. Regan has failed to establish that the comments in his March 26, 2002 appeal letter were protected activities. Due to that evidentiary failure, Mr. Regan is unable to establish a *prima facie* case of discrimination involving his March 2002 suspension appeal.

Summary

For various reasons, the exchanges between Mr. Regan and Mr. Parrish and Mr. Grennan in the fall of 2001 and January 2002 were not protected activities. Even if the events were considered protected activities, the evidence fails to show Mr. Hansen, the supervisor who took the adverse personnel actions against Mr. Regan, was aware of the incidents involving these three individuals. The comments in Mr. Regan's March 26, 2002 appeal letter to Mr. Hansen also are not protected activities because they do not specifically or objectively rise to the level of safety or regulatory violation complaints. Consequently, Mr. Regan has failed to establish that he engaged in protected activities under the Act. Having failed to establish the first requisite element of a *prima facie* case, Mr. Regan's discrimination complaint must be dismissed.

ORDER

The discrimination complaint of MR. RONALD L. REGAN, JR. against NATIONAL

WELDERS SUPPLY brought under the employee protection provisions of Surface Transportation Assistance Act is **DISMISSED**.

SO ORDERED:

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RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: June 30, 2003
Washington, D.C.

NOTICE: This Recommended Decision and Order and the administrative file will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., Washington D.C. 20210. See 29 C.F.R. § 1978.109 (a); 61 Fed. Reg. 19978 and 19982 (1996).